Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

October Term, 1978

No. 78-1488

BRADFORD COAL COMPANY, INC.
Petitioner,

vs.

LAVERE C. and DORIS J. BAUGHMAN, ERNEST and JESSIE BILLOTTE, MABEL E. BOCK, VIOLET DIXON, ROBERT R. and DONNA ELLINGER, GEORGE and RUTH ELINSKY, HOLLIS N. and DOROTHY JEAN KNEPP, HAROLD O. and LORRAINE LANSBERRY, JAMES and CATHERINE LOMBARDO, DELBERT and JANET H. MARSH, LYLE A. and RUTH S. MILLER, HOWARD C. and LORAINE G. SCHAFFER, RICHARD EDMUND and EMMABELL SWANSON, EDWARD L. and M. JOANNE WELSH, ABRAM B. and MABEL L. WISOR, ABE B. and LEDA JANE WISOR, and THOMAS IRVIN and CAROL SHELIA WISOR, and CARL and JEANNETTE LEIDHOLM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Of Counsel:
WILLIAM C. KRINER
NEVLING, DAVIS, KRINER & YEAGER
110 N. Second St.
Clearfield, PA 16830

CHARLES WEISS
DAVID S. WATSON
RICHARD M. ZOMNIR
LOUISE W. YODER
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, PA 15219
Attorneys for Petitioner

March 28, 1979

TABLE OF CONTENTS

APPENDIX

TABLE OF CITATIONS

CASES

STATUTES

REGULATIONS

In the Supreme Court of the United States

October Term, 1978
No.

BRADFORD COAL COMPANY, INC.
Petitioner,

vs.

LAVERE C. and DORIS J. BAUGHMAN, ERNEST and JESSIE BILLOTTE, MABEL E. BOCK, VIOLET DIXON, ROBERT R. and DONNA ELLINGER, GEORGE and RUTH ELINSKY, HOLLIS N. and DOROTHY JEAN KNEPP, HAROLD O. and LORRAINE LANSBERRY, JAMES and CATHERINE LOMBARDO, DELBERT and JANET H. MARSH, LYLE A. and RUTH S. MILLER, HOWARD C. and LORAINE G. SCHAFFER, RICHARD EDMUND and EMMABELL SWANSON, EDWARD L. and M. JOANNE WELSH, ABRAM B. and MABEL L. WISOR, ABE B. and LEDA JANE WISOR, and THOMAS IRVIN and CAROL SHELIA WISOR, and CARL and JEANNETTE LEIDHOLM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Bradford Coal Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 5, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals which was filed on February 5, 1979 but which is not yet reported appears on p. 1a of the Appendix hereto. The opinion of the United States District Court for the Western District of Pennsylvania filed on May 25, 1977, is not reported. It appears in the Appendix at p. 13a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 5, 1979. The judgment affirmed the Order of the United States District Court for the Western District of Pennsylvania, filed March 2, 1978, and amended April 4, 1978. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. With respect to any source, whether Section 304(b) of the Clean Air Act, as amended, 42 U.S.C. §7604(b)[1] (hereafter "Clean Air Act"), precludes the commencement and maintenance of a citizen suit in a federal district court to require compliance by the source with the standards and limitations contained in a state implementation plan when an agency of the state charged with responsibility for enforcing compliance with the plan has already initiated and is diligently prosecuting an enforcement action against the source before a state administrative body vested with jurisdiction over such enforcement actions?

[1]Section 304 of the Clean Air Act (42 U.S.C. §7604) is reproduced beginning at p. 109a of the Appendix.

(a) Whether the Pennsylvania Environmental Hearing Board is a "court of...a State" within the intendment of Section 304(b)(1)(B) of the Clean Air Act?

(b) Whether the Pennsylvania Department of Environmental Resources is a "state" within the intendment of Section 304(b)(1)(B) of the Clean Air Act?

(c) Whether an action for civil penalties under Section 9.1 of the Pennsylvania Air Pollution Control Act,[2] 35 P.S. §4009.1, is a "civil action to require compliance" within the intendment of the Clean Air Act?

II. Whether the Clean Air Act as amended creates a private cause of action for damages for injuries to persons or property resulting from a violation of a state implementation plan?

III. If federal subject matter jurisdiction is lacking, whether a federal district court has or may retain jurisdiction over alleged common law damage claims based upon nuisance?

IV. Whether the issues with respect to petitioner's compliance with the Pennsylvania Implementation Plan should be disposed of on grounds of administrative res judicata since the same issues have been litigated by most of the respondents before the Pennsylvania Environmental Hearing Board?

[2]The Pennsylvania Air Pollution Control Act (35 P.S. §§4001, *et seq.*) is reproduced in its entirety beginning at p. 125a of the Appendix.

STATUTES INVOLVED

Section 304(b) of the Clean Air Act, 42 U.S.C. §7604(b), which provides in relevant part:

> (b) No action may be commenced—
> (1) under subsection (a)(1) of this section—
>
> . . .
>
> (B) if the Administrator or state has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

• • • • •

STATEMENT OF THE CASE

This citizen suit was commenced on December 27, 1976 by 34 individuals who own jointly or individually 18 parcels of real property situated in the town of Bigler, Clearfield County, Pennsylvania. (A. 91a, 98a). They alleged that petitioner Bradford Coal Company, Inc. (herein "petitioner") had violated fugitive emissions limitations and other requirements of the Pennsylvania Implementation Plan by operations of its coal cleaning and storage facility in Bigler. (A. 93a). The respondents sought injunctive relief, compensatory damages for alleged injuries to their persons and property, punitive damages, costs of litigation and reasonable attorney's fees. (A. 94-5a). Preliminary injunctive relief was not sought. Petitioner denied and continues to deny that it violated any standard or requirement of the Pennsylvania Implementation Plan and denies that the district court has jurisdiction of the subject matter of respondents' claims. (A. 103a).

Although respondents sought compensatory damages for alleged injuries to their property and persons resulting from coal dirt allegedly emanating from petitioner's operations (A. 94a), none of the respondents was able to give the total amount of or a breakdown of his or her damage claim when depositions were taken in August, 1977.[3] Amost all of the respondents testified at deposition that the principal objective in bringing this suit was to eliminate alleged fugitive emission problems associated with the operation of petitioner's existing facility.[4] Respondents do not purport to represent other persons who live or own real property in Bigler. Those persons have not joined in this action and have not filed any action for damages or enforcement against petitioner.

When respondents filed their Complaint on December 27, 1976, there was already pending before the Environmental Hearing Board an action against petitioner for alleged violation of fugitive emissions standards. On August 2, 1976, pursuant to Section 9.1 of the Pennsylvania Air Pollution Control Act (A. 140a), the Department of Environmental

---

[3]Deposition References: Richard E. Swanson, pp. 27, 32-33; Emmabell Swanson, p. 31; Doris J. Baughman, pp. 47-50; Violet Dixon, pp. 48-49, 60-61; Dorothy J. Knepp, pp. 24, 31-32; Hollis Knepp, p. 34; Robert R. Ellinger, pp. 14, 21, 25, 26-28, 40-41; Donna M. Ellinger, pp. 40, 48; Harold Lansberry, p. 40; Lorraine Lansberry, pp. 42-43; George Elinsky, pp. 52, 57; Carl A. Leidholm, pp. 43-45; Katherine Lombardo, pp. 32-33, 35; Delbert Marsh, pp. 97-98; Howard C. Shaffer, pp. 64-65; Lorraine B. Shaffer, pp. 7-9; Abe B. Wisor, pp. 22-23; Carol S. Wisor, p. 54; Thomas I. Wisor, p. 35.

[4]Deposition References: Richard E. Swanson, pp. 35; Emmabell Swanson, p. 46; Violet Dixon, pp. 71; Dorothy J. Knepp, p. 62; Hollis Knepp, p. 44; Lorraine Lansberry, pp. 64-66; George Elinsky, pp. 89-90; Carl A. Leidholm, p. 74; Katherine Lombardo, p. 44; Delbert Marsh, p. 69; Howard C. Shaffer, p. 95; Lorraine G. Shaffer, p. 21; Lyle A. Miller, p. 25; Abe B. Wisor, p. 47; Thomas I. Wisor, p. 34; Leda J. Wisor, pp. 62-63.

Resources (herein "DER") filed its action for civil penalties against petitioner before the Environmental Hearing Board at Docket No. 76-096-CP-W. (A. 20a). In that Complaint the DER alleged that:

1) Petitioner has caused since October 26, 1972 the emission of fugitive contaminants, mainly in the form of coal dust into the outdoor atmosphere in violation of Chapter 123, Section 123.1 of the DER's Rules and Regulations[5] (A. 21a);

2) Petioner has caused air pollution as defined in Section 3(5) of the Pennsylvania Air Pollution Control Act in violation of Section 8 of that Act (A. 21a) and Section 121.7 of the DER's Rules and Regulations[6] (A. 21a);

3) Alleged emissions from petitioner's facility have caused violations of the National Primary and Secondary Ambient Air Quality Standards for suspended particulate matter, as set forth in 40 C.F.R. Section 50.7 and 50.8 incorporated into Chapter 131, Section 131.2 of the DER's Rules and Regulations[7] (A. 22a); and

4) Since October 26, 1972, petitioner had expanded its facility in a manner to cause greater amounts of fugitive emissions without first obtaining a permit from the DER in violation of Section 6.1 of the Pennsylvania Air Pollution Control Act and Chapter 127, Section 127.11 of the DER's Rules and Regulations[8] (A. 22a).

[5]The relevant portions of Chapter 123 of the DER's Rules and Regulations is reproduced beginning at p. 151a of the Appendix.

[6]Section 121.7 of Chapter 121 of the DER's Rules and Regulations is reproduced at p. 157a of the Appendix.

[7]Section 131.2 of Chapter 131 of the DER's Rules and Regulations is reproduced at p. 157a of the Appendix.

[8]Section 127.11 of Chapter 127 of the DER's Rules and Regulations is reproduced at p. 158a of the Appendix.

Based on these allegations, the DER prayed for the imposition of a civil penalty in an amount "*. . . sufficient to deter such unlawful conduct in the future. . . .*" (A. 23a). (Emphasis supplied).

The standards and requirements of the Pennsylvania Air Pollution Control Act and DER's Rules and Regulations thereunder which are cited in DER's Complaint against petitioner, are also federal standards and requirements under the Clean Air Act, by reason of their inclusion as part of the Pennsylvania Implementation Plan approved by the United States Environmental Protection Agency pursuant to Section 110 of the Clean Air Act 42 U.S.C. §7410. *See:* 40 C.F.R. 52.2020, 52.2023.[9] Thus, in this citizen suit, respondents purport to require compliance with the same standards and requirements as did DER by its prior Complaint for civil penalties before the Environmental Hearing Board. Specifically, respondents alleged in their Complaint:

1) That emissions of coal dust from petitioner's plant are in violation of the emissions limitations contained in Sections 123.1 and 123.2 of the DER's Rules and Regulations (A. 93a);

2) That alleged emissions of coal dust from petitioner's plant are in violation of Sections 3(5) and 8 of the Pennsylvania Air Pollution Control Act and of Section 121.7 of the DER's Rules and Regulations thereunder (A. 94a); and

3) That alleged emissions of coal dust from petitioner's plant are from sources for which respondents allege petitioner never applied for or received a permit from the DER and thus, are in violation of Section 6.1 of the Pennsylvania Air Pollution Control Act and Section 127.11 of the DER's Rules and Regulations thereunder (A. 94a).

[9]Sections 52.2020 and 52.2023 of 40 C.F.R. are reproduced beginning at p. 159a of the Appendix.

Section 304(b) of the Clean Air Act provides in material part as follows:

> No action may be commenced—
>
> (1) under subsection (a)(1) of this Section—
>
> (B) if the Administrator or state has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

If the prior DER enforcement action is the type of enforcement that Congress sought to encourage by the §304(b)(1)(B) prohibition against citizen suits in the federal courts, then such action precluded the district court from exercising subject matter jurisdiction.

On the basis of the prohibition contained in Section 304(b)(1)(B), petitioner initially moved for dismissal of respondents' Complaint for lack of subject matter jurisdiction. (A. 99a). By Opinion and Order filed on May 25, 1977, the district court denied petitioner's Motion to Dismiss on the ground that the DER enforcement action commenced before the Environmental Hearing Board is not an action to "require compliance" within the meaning of the prohibition of Section 304(b) against citizen suits. (A. 13-17a).

Subsequent to the district court's denial of petitioner's Motion to Dismiss for lack of subject matter jurisdiction, a Consent Order and Agreement was entered into on October 13, 1977, between DER and petitioner settling DER's enforcement action before the Environmental Hearing Board. Under the terms of the Consent Order and Agreement, petitioner is required to comply with applicable standards and limitations of the Pennsylvania Implementation Plan by undertaking certain modifications and procedures to control fugitive emissions from its existing operations until July 1, 1979. (A. 27-30a). As of July 1, 1979, Petitioner is required to cease operations in accordance with the Consent Order and Agreement and to relocate its operations to a new plant being constructed by petitioner on a site beyond the town limits of Bigler at an estimated cost of $12 million. (A. 26a). The Consent Order and Agreement was executed by the Environmental Hearing Board on November 14, 1977. (A. 36a).

Since the Consent Order and Agreement more clearly demonstrated that the prior Environmental Hearing Board proceeding was one to "require compliance" within the meaning of the Section 304(b) prohibition against citizen suits, petitioner filed its Suggestion of Lack of Jurisdiction of the Subject Matter pursuant to Fed.R.Civ.P. 12(h)(3) so that the district court would have the opportunity to reconsider its prior determination of subject matter jurisdiction and to review its prior assessment of the scope and effect of the DER's enforcement action. (A. 106a).

By Order dated March 2, 1978, the district court denied petitioner's renewed request for dismissal, on the ground that "the complaint before the Environmental Hearing Board did not constitute 'a civil action in a court of the state to require compliance,' as required by the jurisdictional exception contained in Section 304(b)(1)(B) of the Clean Air Act, as amended." (A. 12a). Pursuant to petitioner's Motion, the district court certified its Order of March 2, 1978 for appeal pursuant to 28 U.S.C. §1292(b), stating:

> It is the opinion of this court that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. (A. 11a).

Petitioner thereupon filed with the United States Court of Appeals for the Third Circuit its Petition for Permission to Appeal an Order Denying Its Suggestion of Lack of Jurisdiction of the Subject Matter, which Petition was granted by the Court of Appeals by Order entered May 4, 1978 (A.19a).

On February 5, 1979, the Court of Appeals entered judgment in this suit, affirming the district court. The court found that the Environmental Hearing Board was not a "court of ... a State" and thus the pending DER enforcement action against petitioner did not invoke the prohibition of Section 304(b) and deprive the district court of subject matter jurisdiction over respondents' citizen suit.

Many (26) of the respondents herein filed appeals with the Environmental Hearing Board challenging DER's action in entering into the Consent Order and Agreement with petitioner and challenging DER's action in issuing to petitioner certain plan approvals necessary in order for construction to begin on petitioner's new coal cleaning plant, (A. 50a). The Environmental Hearing Board conducted four days of hearings in which many of the respondents participated with legal counsel. On January 26, 1979, the Environmental Hearing Board entered its Adjudication and Order affirming the Consent Order and Agreement as a lawful and reasonable means by which DER could conclude its action for civil penalties and require petitioner's compliance with the Pennsylvania Implementation Plan through closure and relocation of petitioner's coal cleaning plant. The Environmental Hearing Board made numerous findings of fact and conclusions of law which are included in its Adjudication. Thus, many of the respondents have assumed an active role in the final resolution of the enforcement proceedings originated by DER on August 2, 1976. Petitioner was unable to provide the Court of Appeals with a copy of the Environmental Hearing Board's Adjudication and Order prior to the filing of its judgment on February 5, 1979.

REASONS FOR GRANTING THE WRIT

The court below has decided important federal questions of first impression with respect to the administration and enforcement of the Clean Air Act and the jurisdiction of the federal district courts over citizen suits filed under the Clean Air Act to require compliance and recover private damages. These questions have not been but should be settled by the Court.

It has been stated that the prime responsibility for the proper functioning of the federal judiciary rests upon the Supreme Court.[10] Questions of federal jurisdiction impact directly upon how the federal judicial system works. This case presents important questions of federal law which have not been, but should be, settled by this Court. The district court in this case is presented with 34 personal injury claims and 18 property damage claims, each of which presents its own particular set of facts and circumstances. Whether Section 304 of the Clean Air Act, in the absence of any other possible jurisdictional basis, opens the doors of the federal district courts to such claims in any event, or when there is already pending prior state enforcement action before an administrative agency established to hear and decide such cases, are questions of substantial import to the federal judiciary. The answer to these questions may have a significant impact on the caseload of the federal district courts. This case will supply a clear-cut rule for the judiciary to follow in determining whether or not jurisdiction exists to hear Section 304 cases where state agencies have begun internal enforcement proceedings.[11] The question of jurisdiction involved herein is substantially the same as that presented in

[10] R. Stern and E. Gressman, *Supreme Court Practice*, 296 (5th ed. 1978).

[11] Similar guidance will also be provided with respect to citizen suits filed under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1365(b)(1)(B), because federal jurisdiction of such suits is subject to identical limitations.

United States v. Ruzicka, 329 U.S. 287 (1946), which involved the distribution of enforcement authority between the courts and the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. It was necessary for the Court to look at the statute, its purposes and the scheme of administration which Congress had designed. It is precisely these factors which the Court is being asked to consider with reference to the Clean Air Act's citizen suit provision.

A determination of the jurisdictional questions presented will also have a direct effect on several states. A number of the industrial states, including New Jersey, Delaware, Michigan, Illinois, New York, California, and West Virginia, have state administrative proceedings which are functional equivalents of Pennsylvania's Environmental Hearing Board.[12] This decision would put all states on notice as to what status state administrative enforcement proceedings hold with respect to §304. It could also have an effect upon the ability of state agencies to bring about compliance by means of settlement agreements of the type obtained by DER in this case. A source may be less inclined to settle state enforcement proceedings if there remains exposure to subsequent enforcement proceedings in the federal district courts with respect to the same activities.

The outcome of this suit will also affect the many business enterprises which are subject to the requirements of the Clean Air Act. A decision by the Supreme Court will lay to rest any doubts as to whether sources can be caught between

[12]See, N.J. Stat. Ann. §§13:1D-9(e), 26: 2C-14.1, 26:2C-16, 26:2C-17 (West 1964); Del. Code tit. 7, §§6005-8 (Supp. 1978); Michigan Comp. Laws Ann. §§336.18-336.21 (1975); Ill. Ann. Stat. ch. 111½, §1005 (Smith-Hurd 1977); N.Y. Envir. Conserv. Law §§ 19-0301(1)(d), 19-0505, 19-0507 (McKinney 1973); Cal. Health & Safety Code §§40800, 40830, 40840, 40860-65 (West 1979); W. VA. Code §§16-20-5(6), 16-20-6, 16-20-7 (1972).

inconsistent rulings because of concurrent state and federal enforcement proceedings containing identical issues.

I. **With respect to any source, whether Section 304(b) of the Clean Air Act, precludes the commencement and maintenance of a citizen suit in a federal district court to require compliance by the source with the standards and limitations contained in a state implementation plan when an agency of the state charged with responsibility for enforcing compliance with the plan has already initiated and is diligently prosecuting an enforcement action against the source before a state administrative body vested with jurisdiction over such enforcement actions.**

Section 304(b)(1)(B) prohibits the commencement of citizen suits "if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order [which the citizen suit contemplates enforcing]." The legislative history of this provision indicates that enforcement is to be achieved primarily through administrative action. The citizen suit was envisioned as an option of last resort when citizens are faced with inadequate government action. Senate Debates, *A Legislative History of the Clean Air Amendments of 1970*, p. 280 (A. 123a). The notice requirement gives the government a chance to act and supply the relief which the citizen seeks without the need for burdening the already over-burdened federal courts. See Senate Debates, *A Legislative History of the Clean Air Amendment of 1970*, p. 355 (A. 121a). The case law reiterates the view that the citizen suit mechanism was intended to be subordinate to effective administrative enforcement.

> The legistative history of Section 304 shows Congress' determination that citizen participation in the enforcement of standards and regulations under the Clean Air

> Act of 1970 be established. It also shows, however, that Congress intended to provide for citizen suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in Section 304. Congress' intention would be frustrated if the statutory mandate of Section 304(b) were ignored.

City of Highland Park v. Train, 519 F.2d 681, 690-91 (7th Cir. 1975). See also, *California v. Dept. of Navy*, 431 F. Supp. 1271, 1278 (N.D.Cal. 1977).

The DER enforcement action before the Environmental Hearing Board meets all three (3) requirements expressed in Section 304(b)(1)(B). The Environmental Hearing Board is a "court of ... a State" within the intendment of Section 304(b)(1)(B). The DER, which was diligently prosecuting petitioner, fulfills the role of the state in the Environmental Hearing Board proceeding. And finally, the civil penalties action brought by DER under Section 9.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. §4009.1, which culminated in the Consent Order and Agreement, is a civil action to require compliance.

(a) Whether the Pennsylvania Environmental Hearing Board is a "court of a state" within the intendment of Section 304(b)(1)(B) of the Clean Air Act?

In *United States v. Pennsylvania Environmental Hearing Board*, 377 F. Supp. 545 (M.D.Pa. 1974), it was held that the Environmental Hearing Board was a "state court" for purposes of the federal removal statute. The court in *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38, 43 (1st Cir. 1972), held that mere nomenclature was not determinative. Instead, the court focused on how the Board functioned: its procedures and enforcement

powers. Clearly, the Environmental Hearing Board acts like "a court of ... a State" in adjudicating enforcement proceedings and in reviewing the DER's compliance orders. Further, the Environmental Hearing Board has the power to assess substantial civil penalties to effect compliance.[13] The threat of substantial fines for noncompliance provides the Environmental Hearing Board with the means to achieve meaningful and effective enforcement of the Pennsylvania Implementation Plan. Therefore, the Environmental Hearing Board's inability to grant an injunction does not by any means inhibit its capability to require compliance by sources with the Implementation Plan. The Board hearings are equivalent to a full trial on the merits. The parties have the right to present evidence, cross examine, object, move and argue and all witnesses are sworn or affirm. Rules of Practice and Procedure for the Environmental Hearing Board, 25 P.C. §21.33(a). (A. 164a). The Board makes findings of fact and conclusions of law. (A. 53a). The Board can issue subpoenas and has the ability to grant intervention. 25 P.C. §§21.15(a), 21.14(b). (A. 162-5a). In that regard, the respondents undoubtedly would have been permitted to intervene initially in the DER's enforcement action against petitioner had they requested to do so as permission is readily obtainable and frequently granted. *Joseph B. Gable Estate v. DER*, EHB Docket No. 77-085-D; *City of Johnstown v. DER*, EHB Docket No. 77-050-W. Many (26) respondents have effectively intervened in the DER's enforcement action against petitioner by appealing to the Environmental Hearing Board the DER's action in entering into the Consent Order and Agreement and issuing the construction permits. (A. 50a). The scope of judicial review for the Environmental

---

[13]Pursuant to 35 P.S. §4009.1 (Civil Penalties), the Environmental Hearing Board has the power to assess $2,500/day fines for each day of continued violation and a civil penalty of $10,000. Over an entire year a source could be fined by the Board up to $922,500.

Hearing Board adjudications is fundamentally the same as that generally afforded courts by the Pennsylvania appellate courts. 71 P.S. §1710.44; *Lawner v. Englebach*, 422 Pa. 311, 315, 240 A.2d 295, 297 (1969). And finally, res judicata applies to the findings of the Environmental Hearing Board. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). In view of its extensive judicial characteristics, the Environmental Hearing Board functions as "a court of ... a State" within the intendment of Section 304(b).

(b) Whether the Pennsylvania Department of Environmental Resources is a "state" within the intendment of Section 304(b)(1)(B) of the Clean Air Act?

The DER acted on behalf of the state in commencing and diligently prosecuting the petitioner. The Commonwealth acts through the DER which has been conferred with the "responsibility for enforcement of the Commonwealth's air pollution laws." *DER v. Pennsylvania Power Co.*, 34 Pa.Cmwlth. 546, 550 n.3, 384 A.2d 273, 276 n.3 (1978).

Pertinent legislative history indicates that a "state", within the scope and meaning of Section 304(b)(1)(B), should be interpreted as any state governmental unit which initiates an enforcement action to require compliance with an implementation plan.

> If there is any justification for citizen suits it is in those circumstances involving complete government inaction. The government is the proper source for the selection of enforcement tools, and its discretion in this regard should not be disrupted by private litigation. Where the government, federal or state, initiates enforcement procedures prior to, within or beyond a reasonable notice period, there is no rational justification for private suits.

Senate Public Works, Committee Comments, *A Legislative History of the Clean Air Amendments of 1970*, p. 731. (A. 113a). There can be no doubt that the enforcement action brought by the DER against petitioner is an action commenced as "a state".

(c) Whether an action for civil penalties under Section 9.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. §4009.1, is a "civil action to require compliance" within the intendment of the Clean Air Act.

The third prong of the §304(b) requirements which prohibit commencement of a citizen suit is whether the Environmental Hearing Board proceeding seeking imposition of civil penalties constitutes "a civil action to require compliance." Clearly the DER viewed its enforcement action as one to require compliance. Its Complaint stated:

> [T]he Department hereby requests that the Board assess a civil penalty...in an amount based upon...(c) the expenses incurred by the Department in its effort *to secure* Bradford Coal's *compliance* with the duties imposed on it by law and the *cessation* of the unlawful conduct alleged herein; and (d) the degree of culpability associated with Bradford Coal's unlawful conduct and which is sufficient to *deter* such unlawful conduct in the future. (A. 22-3a).

(Emphasis supplied). Marvin Durning, the EPA's Assistant Administrator of Enforcement, also views an action for civil penalties as a method of attaining compliance. In his memorandum of April 11, 1978 to Regional Administrators he said, "The objective of this civil penalty policy is to assist in accomplishing the goals of environmental laws by deterring violations and encouraging voluntary compliance." (A. 166a). Mr. Durning further stated that the penalties are structured to provide an incentive for rapid compliance because they are assessed in accordance with the length of time of non-compliance. The sooner a facility complies, the less its

penalties will be. (A. 168a). The Pennsylvania Commonwealth Court also views civil penalties in this light. *DER v. Pennsylvania Power Co., supra,* at 285. The Consent Agreement which petitioner entered into as a result of the DER enforcement action clearly demonstrates how that action requires compliance.

As the above discussion indicates, all of the requirements set forth in §304(b) were met. This citizen suit should be deemed to be precluded by DER's prior enforcement action before the Environmental Hearing Board. To conclude otherwise would frustrate Congress' intent to encourage effective governmental enforcement rather than private citizen suits in the federal district courts. Such citizen suits were viewed by Congress as appropriate and necessary only in the event of "... complete government inaction." (A. 116a).

II. WHETHER THE CLEAN AIR ACT AS AMENDED CREATES A PRIVATE CAUSE OF ACTION FOR DAMAGES FOR INJURIES TO PERSONS OR PROPERTY RESULTING FROM A VIOLATION OF A STATE IMPLEMENTATION PLAN?

By including claims for compensatory damages in their Complaint, respondents do not establish federal subject matter jurisdiction where it is otherwise lacking because the Clean Air Act does not create a private cause of action for damages allegedly sustained as a result of violations of the Clean Air Act. Senators Hart and Muskie unequivocally stated that the Act made no provision for damages to the individual. Senate Debates, *Legislative History, supra* at 280, 353, 355. (A. 123-4a, 118a, 122a). Thus, there is no basis for federal question jurisdiction under 28 U.S.C. §1331.

III. IF FEDERAL SUBJECT MATTER JURISDICTION IS LACKING, WHETHER A FEDERAL DISTRICT COURT HAS OR MAY RETAIN JURISDICTION OVER ALLEGED COMMON LAW DAMAGE CLAIMS BASED UPON NUISANCE?

There can be no pendent jurisdiction of the respondents' common law damage claims because there is no basis for federal jurisdiction in the first place. The dismissal of this citizen suit under §304(b) of the Clean Air Act and the Congressional denial of the existence of a private cause of action for damages under the Clean Air Act, leave only common law nuisance claims to litigate. In *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1965), the Court deemed it appropriate to leave decisions under state law to state tribunals:

> Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the State claims should be dismissed as well.

IV. WHETHER THE ISSUES WITH RESPECT TO PETITIONER'S COMPLIANCE WITH THE PENNSYLVANIA IMPLEMENTATION PLAN SHOULD BE DISPOSED OF ON GROUNDS OF ADMINISTRATIVE RES JUDICATA SINCE THE SAME ISSUES HAVE BEEN LITIGATED BY MOST OF THE RESPONDENTS BEFORE THE ENVIRONMENTAL HEARING BOARD?

Assuming, *arguendo,* that there is jurisdiction in the district court of this citizen suit, the compliance portion of respondents' claims should be dismissed as *res judicata,* at least with respect to the 26 respondents who challenged unsuccessfully the validity of the Consent Order and Agreement before the Environmental Hearing Board. The Environmental Hearing Board adjudication decided the compliance issues raised by respondents herein. No appeal was

taken therefrom. Thus, a final determination was made with respect to the compliance issues. According to *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), *res judicata* applies to administrative proceedings in appropriate circumstances.

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. at 422. As mentioned above, the Environmental Hearing Board Adjudication is for practical purposes a full trial. The parties had the opportunity to litigate the issues fully through counsel. To permit respondents to relitigate the same issues in the federal district court will encourage vexatious litigation and will add further to the already overburdened federal courts.

Admittedly, respondents have not litigated their individual damage claims at the state level. However, since the Environmental Hearing Board's adjudication is *res judicata* with respect to the compliance issues raised by respondents in their citizen suit, the district court should refrain from entertaining pendent common law damage claims in light of the principles enunciated by the Court in *United Mine Workers v. Gibbs*, 385 U.S. 715 (1965).

In summary, the petitioners contend that the respondents' action raises for the first time significant issues concerning when federal jurisdiction exists in environmental enforcement actions. Such issues should be decided before the federal district court in this case and possibly other federal district courts are required to entertain numerous and varied claims for private damages on the basis of the jurisdiction provided by §304 of the Clean Air Act and principles of pendent jurisdiction.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Of Counsel:
WILLIAM C. KRINER
NEVLING, DAVIS, KRINER & YEAGER
101 N. Second St.
Clearfield, PA 16830

March 28, 1979

CHARLES WEISS
DAVID S. WATSON
RICHARD M. ZOMNIR
LOUISE W. YODER
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, PA 15219
Attorneys for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1764

LAVERE C. and DORIS J. BAUGHMAN, ERNEST and JESSIE BILLOTTE, MABLE E. BOCK, VIOLET DIXON, ROBERT R. and DONNA ELLINGER, GEORGE and RUTH ELINSKY, HOLLIS N. and DOROTHY JEAN KNEPP, HAROLD O. and LORRAINE LANSBERRY, JAMES and CATHERINE LOMBARDO, DELBERT and JANET H. MARSH, LYLE A. and RUTH S. MILLER, HOWARD C. and LORAINE G. SHAFFER, RICHARD, EDMUND and EMMABELL SWANSON, EDWARD L. and M. JOANNE WELSH, ABRAM B. and MABEL L. WISOR, ABE B. and LEDA JANE WISOR, and THOMAS IRVIN and CAROL SHELIA WISOR, and CARL and JEANNETTE LEIDHOLM,

Plaintiffs-Appellees,

vs.

BRADFORD COAL CO., INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (CIVIL NO. 76-1609)

Submitted Under Third Circuit Rule 12(6)
December 14, 1978

Before ALDISERT, and ADAMS, *Circuit Judges,*
and COOLAHAN, District Judge.*

(Filed Feb. 5, 1979)

DAVID S. WATSON
RICHARD M. ZOMNIR
THORP, REED & ARMSTRONG
Pittsburgh, Pa. 15219
and
WILLIAM C. KRINER
NEVLING, DAVIS, KRINER & YEAGER
Clearfield, Pa. 16830
Attorneys for Appellant

MARVIN A. FEIN
Pittsburgh, Pa. 15219
Attorneys for Plaintiffs-Appellees

* Honorable James A. Coolahan, United States District Judge for the District of New Jersey, sitting by designation.

COOLAHAN, U.S. Senior District Judge

Several residents of Bigler, Pennsylvania filed this action under the Clean Air Act, 42 U.S.C. §7401 *et seq.*, against the Bradford Coal Company ("Bradford") alleging that the Bradford coal processing plant located in Bigler violated the Pennsylvania Implementation Plan.[1] Bradford brought an interlocutory appeal, duly autorized under 28 U.S.C. §1292(b), from the denial of its motion to dismiss the action for lack of subject matter jurisdiction. We affirm.

The complaint in the District Court was filed on December 27, 1976. Well before that date the Pennsylvania Department of Environmental Resources ("DER") began an action before the Pennsylvania Environmental Hearing Board ("Hearing Board") for civil penalties against Bradford, pursuant to 35 P.S. §4009.1. This action alleged the same violations of the Plan which the Bigler Residents would later aver in their suit. While the DER did not request a direct prohibition of further plan violations by Bradford, it did pray that the assessed penalty be "sufficient to deter such unlawful conduct in the future."[2]

Pursuant to 42 U.S.C. §7604(a)(1), formerly 42 U.S.C. §1857h-2(a)(1), federal district courts have jurisdiction over suits by private citizens to enforce Clean Air Act implementation plans against violators. However, 42 U.S.C. §7604(b)(1)(B) provides that no such action may be commenced

[1]Under the Clean Air Act, each State is required to promulgate a scheme to control the level of air pollution which complies with certain minimum national standards. Such schemes are called "implementation plans," and are subject to the approval of the Environmental Protection Agency ("EPA"). Once approved, a plan is enforcible by either the State or the EPA. *Friends of the Earth v. Carey*, 535 F.2d 165 (2nd Cir. 1976), *cert. den.*, 434 U.S. 902 (1977).

[2]On October 15, 1977, after commencement of this action, the DER and Bradford entered into a Consent Order of Settlement for the civil *(continued)*

Pursuant to 42 U.S.C. §7604(a)(1), formerly 42 U.S.C. §1857h-2(a)(1), federal district courts have jurisdiction over suits by private citizens to enforce Clean Air Act implementation plans against violators. However, 42 U.S.C. §7604(b)(1)(B) provides that no such action may be commenced

> if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard....

Bradford argues that the DER civil penalty action before the Hearing Board was prior to "civil action in a court of ... a State to require compliance" with the Plan. Accordingly, Bradford asserts, there is no subject matter jurisdiction under §7604 to entertain this suit. Finding that the Hearing Board is not a "court of ... a State," we disagree.[3]

penalties action. Bradford agreed to pay the State $10,000 for past violations and to construct a new plant by December 31, 1979 which would comply with the Plan. The DER agreed to allow Bradford to continue to operate its old Bigler plant until July 1, 1979, provided that Bradford "take all reasonable interim measures at the existing site to keep fugitive emissions to a minimum" (albeit, apparently, in excess of Plan levels). The DER also agreed not to institute any further enforcement actions against Bradford so long as Bradford complied with the agreement. The Order was not submitted to the EPA for approval. Variances from an implementation plan granted by a State are not effective until approved by the EPA. *Friends of the Earth v. Carey, supra.*

[3]Thus we need not, and do not, decide whether an action for civil penalties against a violator is an "action ... to require compliance" with an implementation plan. We note that Congress recently enacted 42 U.S.C. §7420(a) which empowers both the States and the EPA to administratively assess and collect civil penalties from violators. The purpose of the provision was, *inter alia*, "to encourage compliance as effectively as possible ..." H.R.Rep. No. 294 (Interstate and Foreign Commerce Committee), 95th Cong., 1st Sess. 5 (1977). Nevertheless, Congress was careful to add subsection (f) which provides:

> Any orders, payments, sanctions, or other requirements under this section shall be in addition to any other permits, orders, payments, sanctions, or other requirements established under this chapter, and shall in no way affect any civil or criminal *enforcement proceedings brought under any provision of this chapter* or State or local law. (emphasis added).

This is an issue of first impression; we can find no cases construing §7604(b)(1)(B) or its equivalent in the Federal Water Pollution Control Act, 33 U.S.C. §1365(b)(1)(B). Generally, the word "court" in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers. *United States v. Franz*, 220 F.2d 123, 125 (3rd Cir.), *cert. den.*, 349 U.S. 954 (1955); *Nelson v. Real Estate Comm'n*, 35 Md. App. 334, 370 A.2d 608, 614 (1977); *Department of State v. Spane*, 1 Pa. Comm. 240, 274 A.2d 564 (1971). Nevertheless, an administrative board may be a "court" if its powers and characteristics make such a classification necessary to achieve statutory goals. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972). Indeed, the Pennsylvania Environmental Hearing Board has been held to be a "State Court" for purposes of the Federal Removal Statute, 28 U.S.C. §1442. *United States v. Pennsylvania Environmental Hearing Board*, 377 F.Supp. 545, 553 (M.D. Pa. 1974).

There is little legislative history on the subsection at issue: 7604(b)(1)(B). That subsection, which did not appear in either the House or the Senate bills,[4] was added by the Committee on Conference. The Committee tersely stated of §7604(b)(1)(B):

[4]It may be argued that the Senate bill contained in its notice requirement an implied preclusion of private suits in the event of prior agency action. Section 304(a)(3) provided:

> No such suit shall be filed unless such person or persons shall have afforded the Secretary, his representative, or such agency, at least thirty days from the receipt of such notice *to institute enforcement proceedings under this title to abate such alleged violation;*

(emphasis added). S.Rep. No. 1196 (Senate Comm. on Public Works) 91st Cong., 2nd Sess. 122 (1970). However, in its Statement of Intent, the Senate Committee on Public Works said:

> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed

(continued)

> If an abatement action is pending and is being diligently pursued in a United States or State court, such action cannot be commenced but any party in interest may intervene as a matter of right.

H.R.Rep. 1783, 91st Cong., 2d Sess. (1970) at p. 55.

There is however an extensive legislative history to establish that Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism. *See*, S.Rep. No. 1196, 91st Cong., 2d Sess. 2, 35-36 (1970) and the comments of Senator Muskie and Senator Boggs in 116 Cong. Rec. (1970) at pp. 32902, 32918, respectively. *Accord: Friends of the Earth v. Carey, supra* 535 F.2d at 172; and *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 700 (1975). The same legislative history also indicates

> that Congress intended to provide for citizen suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief.

City of Highland Park v. Trin, 519 F.2d 681, 690-91 (7th Cir. 1975). See, Remarks of Senator Muskie at 116 Cong.Rec. 32926 and 33102 (1970) and those of Senator Hart, *Id.* at 33183.

> efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

Id. p. 37

The preclusion of §7604(b)(1)(B), and the constituent phrase "court of ... a State", must be construed in light of those policies. Accordingly, for a State administrative board to be a "court" under that sub-section, that tribunal must be empowered to grant relief which will provide meaningful and effective enforcement of an implementation plan. Unless this were true, any action by a State before the board would neither alleviate the need for judicial relief nor supplant the enforcement function of citizen suits.

The Clean Air Act does provide a benchmark for evaluating the sufficiency of State administrative remedies. Section 7604(b)(1)(B) also precludes citizen suits where the EPA has commenced a "civil action in a court of the United States." Thus, Congress believed that such proceedings would provide effective enforcement and obviate the need for citizen actions. Under 42 U.S.C. §7413, the EPA may sue

> for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both ....

Congress thus perceived that effective enforcement required, in addition to the sanction of penalties, the option of an injunction to mandate compliance. Some large discharges of pollutants might believe it more economical to pay a fine than to incur the costs of compliance. Without injunctions, enforcers would be compelled, in effect, to sell a variance from an implementation plan to any wealthy pollutor.

It follows that to constitute a "court" in which proceedings by the State will preclude private enforcement actions under §7604, a tribunal must have the power to accord relief which is the substantial equivalent to that available to the EPA in federal courts under the Clean Air Act. The Pennsylvania Environmental Hearing Board lacks this capacity. Pursuant to 35 P.S. §4009.1, the Hearing Board is empowered

only to assess a penalty which cannot exceed $10,000 plus $2,500 for each day of continuing violation of the Implementation Plan. Thus, the maximum potential financial deterrent available to the Hearing Board is merely one-tenth that wielded by federal courts. More significantly, the Hearing Board lacks the power to enjoin violations of the Plan. *Cf.* 71 P.S. §510-21 and 35 P.S. §4006. Compare, 35 P.S. §4010.

The procedures of the Hearing Board are also deficient. Section 7604(b)(1)(B) provides that where an agency commences an action in federal court, citizens may intervene in those proceedings "as *a matter of right.*"(emphasis added). Apparently Congress intended that, even where private enforcement actions were precluded, the salutary effects of citizen gadflies should be preserved by allowing their participation as intervenors in the government-initiated suit. The right of intervention is, of course, not applicable to proceedings "in a court of ... a State". Nevertheless, we believe that the existence of such a right may be properly considered as one factor[5] in determining whether a particular state tribunal is a "court" for purposes of preclusion of citizen actions.

Under the Hearing Board's Rules of Practice and Proceedure, citizen intervention is not of right, but rather is discretionary with the Board. 25 P.C. §21.14(b). Thus, were the Board held to be a "court", citizens could be effectively frozen out of the enforcement process. Such a result would contravene the general Congressional intent of the Clean Air Act.

Accordingly, we find that the Pennsylvania Environmental Hearing Board not to be a "court" under

---

[5]Accordingly, we do not decide whether the lack of citizen intervention of right, alone, is a sufficient basis to find an otherwise competent tribunal not be a "court" under §7604(b)(1)(B).

§7604(b)(1)(B). The District Court's Order that it has jurisdiction under the Clean Air Act will be affirmed.[6]

DATE: /s/ JAMES A. COOLAHAN
James A. Coolahan
U.S. Senior District Judge

[6]Because of this conclusion, we do not address the alternative jurisdictional bases argued by the parties.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1764

LAVERE C. and DORIS J. BAUGHMAN, ERNEST and JESSIE BILLOTTE, MABEL E. BOCK, VIOLET DIXON, ROBERT R. and DONNA ELLINGER, GEORGE and RUTH ELINSKY, HOLLIS N. and DOROTHY JEAN KNEPP, HAROLD O. and LORRAINE LANSBERRY, JAMES and CATHERINE LOMARDO, DELBERT and JANET H. MARSH, LYLE A. and RUTH S. MILLER, HOWARD C. and LORAINE G. SHAFFER, RICHARD EDMUND and EMMABELL SWANSON, EDWARD L. and M. JOANNE WELSH, ABRAM B. and MABEL L. WISOR, ABE B. and LEDA JANE WISOR, and THOMAS IRVIN and CAROL SHELIA WISOR, CARL and JEANNETTE LEIDHOLM

vs.

BRADFORD COAL COMPANY, INCORPORATED,
Appellant

(D. C. Civil No. 76-1609)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT and ADAMS, *Circuit Judges* and COOLAHAN, *District Judge*•

• Honorable James A. Coolahan, United States District Judge for the District of New Jersey, sitting by designation

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) December 14, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 2, 1978, as amended by the order of the said District Court filed April 4, 1978, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

February 5, 1979

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al,
Plaintiffs,
vs.
BRADFORD COAL COMPANY, INC.,
Defendant.

Civil Action No. 76-1609

ORDER OF COURT

AND NOW, this 4th day of April, 1978, after due consideration of "Defendant's Motion to Certify Order of Court for Appeal" and of plaintiff's response thereto, it appearing that the Order of March 2, 1978, denying defendant's renewed challenge to the jurisdiction of this court under the Clean Air Act involves a controlling question of law as to which there is ground for difference of opinion, and it further appearing that an appeal from that order prior to the trial on the claims of the numerous plaintiffs may materially advance the ultimate termination of this litigation,

IT IS ORDERED that the Order dated March 2, 1978, (and designated as docket entry 91) be and the same hereby is amended to include the following paragraph:

"It is the opinion of this court that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation."

cc: Marvin A. Fein, Esq.
1602 Law & Finance Bldg.
Pittsburgh, Pa. 15219

/s/ Robert F. Marsh
United States District Judge

James K. Nevling, Esq.
110 N. Second Street
Clearfield, Pa. 16830

David S. Watson, Esq.
2900 Grant Building
Pittsburgh, Pa. 15219

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al,
Plaintiffs,
vs.
BRADFORD COAL COMPANY, INC.,
Defendant.

Civil Action No. 76-1609

ORDER OF COURT

AND NOW, this 2nd day of March, 1978, the defendant having filed a "Suggestion of Lack of Jurisdiction of the Subject Matter" advising the court that a Consent Order and Agreement has been entered into by the defendant and the Pennsylvania Department of Environmental Resources as a result of a complaint filed by the Department before the Environmental Hearing Board in August, 1976, and after due consideration of the oral and written arguments of counsel, it appearing that the complaint before the Environmental Hearing Board did not constitute "a civil action in a court of the United States or a State to require compliance..." as required by the specific language of the jurisdictional exception in the Clean Air Act, 42 U.S.C. § 1857h-2(b)(1)(B), IT IS ORDERED that defendant's renewed request for dismissal be and the same hereby is denied.

cc: Marvin A. Fein, Esquire
1602 Law & Finance Building
Pittsburgh, Pa. 15219

/s/ Robert F. Marsh
United States District Judge

James K. Nevling, Esq.
110 N. Second Street
Clearfield, Pa. 16830

David S. Watson, Esq.
2900 Grant Building
Pittsburgh, Pa. 15219

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al,
Plaintiffs,
vs.
BRADFORD COAL COMPANY, INCORPORATED,
Defendant.

Civil Action No. 76-1609

OPINION

Marsh, *District Judge*

The plaintiffs reside in Bigler, Pennsylvania in close proximity to the defendant's coal processing plant. In this action, plaintiffs allege that voluminous amounts of coal dust escape from the defendant's facilities and cause damage and deterioration to plaintiffs' health and property. Plaintiffs are seeking to enjoin the defendant from operating the processing plant (1) until defendant receives a permit from the Pennsylvania Department of Environmental Resources, and (2) unless the plant is operated in compliance with the applicable emission limitations promulgated under the Pennsylvania Air Pollution Control Act. Plaintiffs also seek compensatory and punitive damages.

Defendant has filed a motion to dismiss alleging: that Section 304 of the Clean Air Act (42 U.S.C. § 1857h-2) does not grant a private cause of action to recover damages; that the plaintiffs lack standing and this court lacks jurisdiction because the Commonwealth of Pennsylvania has commenced and is prosecuting a civil enforcement action against the defendant before the Pennsylvania Environmental Hearing Board (76-096-CP-W); and, that several plaintiffs failed to give notice as required by Section 304(b)(1)(A) of the

Clean Air Act. After due consideration of the written and oral arguments of counsel,[1] defendant's motion will be denied.

Section 304(a) of the Clean Air Act (42 U.S.C. § 1857h-2(a)) provides that any person may bring an action in a federal district court to enforce an emission standard or limitation in an implementation plan. The Pennsylvania Air Pollution Control Act is part of the approved Pennsylvania Implementation Plan enforceable under the Clean Air Act. An exception in the Clean Air Act prohibits the bringing of such an enforcement action

> "if the Administrator or State has commenced and is diligently prosecuting a civil action in a Court of the United States or a state to require compliance with the standard, limitation or order, ..."

42 U.S.C. § 1857h-2(b)(1)(B).

Defendant has alleged that the action now before the Pennsylvania Environmental Hearing Board satisfies this exception and thus bars the plaintiffs' action. However, according to the affidavit of Larry W. Wonders, regional air pollution control engineer for the Pennsylvania Department of Environmental Resources and the state official with enforcement responsibility for the Bigler area, the Commonwealth

> "has not prosecuted a civil action in a court of the United States or in the courts of Pennsylvania to require compliance with the Pennsylvania state implementation plan or any portion thereof, ..."

[1]Oral argument on defendant's motion was held on April 12, 1977. Counsel for the defendant did not present an argument at that time, but instead requested leave to submit a reply brief. The reply brief was received May 10, 1977.

Documents accompanying this affidavit demonstrate that the complaint filed before the Pennsylvania Environmental Hearing Board seeks the assessment of civil penalties for past damages to the Commonwealth's air resources, but that the complaint does not seek to require compliance with air quality standards. Defendant has submitted no affidavit to the contrary. We cannot conclude that the complaint before the state board bars the plaintiffs' action in this court.

With respect to the issue of notice, plaintiffs contend that the statutory requirements were satisfied by a letter dated October 26, 1976, from plaintiffs' counsel to the Administrator of the Environmental Protection Agency. A copy of this letter attached to plaintiffs' brief indicates that copies were sent to Alan Walker, president of the defendant corporation, and to various state and federal officials. The letter stated that 16 named families in Bigler[2] and various other citizens of Bigler intended to file an action in federal court against Bradford Coal Company pursuant to the Clean Air Act. Plaintiffs' complaint was filed December 27, 1976. Defendant responded to the complaint by filing the motion to dismiss on February 28, 1977. Thus, even if the October 26th letter is not considered satisfactory notice, the defendant had the benefit of more than 60 days notice before responding to the complaint. The purposes of the notice provision have been fulfilled, *Metropolitan Washington Coali-*

[2]The letter listed the following names:
Mr. and Mrs. Fred Albert; Mrs. Mabel Bock; Mr. Wallace Dixon; Mr. George Elinsky; Mr. and Mrs. Robert Ellinger; Mr. and Mrs. Hollis Knepp; Mr. and Mrs. Harold Lansberry; Mr. and Mrs. Carl Leidholm; Mr. James Lombardo; Mr. Delbert Marsh; Mr. and Mrs. Lyle Miller; Mr. and Mrs. Richard Swanson; Mr. Howard C. Shaffer; Mr. and Mrs. Edward Welch; Mr. Abe Wisor, Jr.; Mr. and Mrs. Thomas Wisor.

Those plaintiffs not specifically named in the letter were: Laverne C. and Doris J. Baughman; Ernest and Jessie Billotte; Violet Dixon; Ruth Elinsky; Catherine Lombardo; Janet H. Marsh; Loraine G. Shaffer; Abram and Mabel L. Wisor; Leda Jane Wisor.

tion for Clean Air v. District of Columbia, 511 F.2d 809, 814 (D.C.Cir. 1975), and the action will not be dismissed for lack of notice.

The section of the Clean Air Act authorizing citizen suits §1857h-2(e) entitled "Non-restriction of other rights" provides:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or seek any other relief...."

Thus, with respect to the issue of damages although there is no provision in the Act itself specifically authorizing a district court to award damages for injuries to person or property in citizen suits, it may be that a citizen has a right to sue a statutory violator at common law for damages for such injuries. Therefore, it may be that a district court could in its discretion take jurisdiction of a pendant action for such damages. See dicta in *Delaware Citizens For Clean Air, Inc. v. Stauffer Chemical Co.*, 367 F.Supp. 1040, 1047 (D.Del.) *aff'd* 510 F.2d 969 (3rd Cir. 1975).

An appropriate order will be entered.

May 25, 1977 /s/ Robert F. Marsh
Date *United State District Judge*

cc: Marvin A. Fein, Esquire
1603 Law & Finance Building
Pittsburgh, Pa. 15219

James K. Nevling, Esquire
110 N. Second Street
Clearfield, Pa. 16830

David S. Watson, Esquire
2900 Grant Building
Pittsburgh, Pa. 15219

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al,
Plaintiffs,
vs.
BRADFORD COAL COMPANY, INCORPORATED,
Defendant.

Civil Action No. 76-1609

ORDER OF COURT

AND NOW, to-wit, this 25th day of May, 1977, the defendant having filed a "Motion to Dismiss" and after due consideration of the oral and written arguments of counsel and the affidavit submitted by plaintiffs, IT IS ORDERED, ADJUDGED AND DECREED that the defendant's motion to dismiss be and the same hereby is denied.

IT IS FURTHER ORDERED that the defendant shall file an answer on or before Friday, June 3, 1977.

/s/ ROBERT MARSH
United States District Judge

cc: Marvin A. Fein, Esquire
1603 Law & Finance Building
Pittsburgh, Pa. 15219

James K. Nevling, Esquire
110 N. Second Street
Clearfield, Pa. 16830

David S. Watson, Esquire
2900 Grant Building
Pittsburgh, Pa. 15219

THOMAS F. QUINN
CLERK

TELEPHONE
215-597-2995

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

May 4, 1978

Re: Lavere C. and Doris J. Baughman, et al. vs. Bradford Coal Co., Inc., Petitioner

C. A. Misc. Rec. No. 78-8074

Gentlemen:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case.

Very truly yours,

/s/ T. F. QUINN
T. F. Quinn, *Clerk*

MEF:dn
Enclosure
Copies to all parties

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

April 28, 1978

C. A. Miscellaneous Record No. 78-8074

LAVERE C. and DORIS J. BAUGHMAN, et al.

VS.

BRADFORD COAL COMPANY, INC.,
Petitioner

(W.D. Pa. Civil No. 76-1609)

Present: SEITZ, *Chief Judge*, and VAN DUSEN and ROSENN, *Circuit Judges*.

1. Petition for permission to appeal, pursuant to 28 U.S.C. §1292(b)
2. Answer by respondents to petition for permission to appeal

in the above-entitled case.

Respectfully,

/s/ T. F. QUINN
Clerk

nj
enc.

The foregoing Motion is granted. Chief Judge Seitz would deny permission to appeal.

By the Court,

/s/ MAX ROSENN
Judge

Dated: May 4, 1978

COMMONWEALTH OF PENNSYLVANIA
Before the
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, *Plaintiff* v. BRADFORD COAL COMPANY, INC. Bigler, Clearfield County, Pennsylvania, *Defendant*	**Docket No. 76-096-CPR**

COMPLAINT FOR CIVIL PENALTIES

1. The Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "Department"), which brings this action pursuant to §9.1 of the Pennsylvania Air Pollution Control Act (hereinafter "Air Pollution Act"), the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq., and the Rules and Regulations promulgated thereunder.

2. The Defendant is Bradford Coal Company, Inc. (hereinafter "Bradford Coal"), a corporation duly incorporated under the laws of Pennsylvania, which has its business address at Bigler, Pennsylvania.

3. At all times material herein, Bradford Coal has owned and operated a coal processing and cleaning facility in Bigler, Clearfield County.

4. This facility is located in a neighborhood of residential houses in Bigler.

5. Bradford Coal has not, at any time, applied to the Department for a temporary variance from the legal standards or requirements set forth in this complaint pursuant to Chapter 141 of the Department's Rules and Regulations.

6. Since October 26, 1972, as the proximate result of violations of law, Bradford Coal has added to its net earnings sums which otherwise would have been expended to reduce air pollution.

Count I

7. The allegations of paragraphs one (1) through six (6) are incorporated herein by reference.

8. Since October 26, 1972, in the course of operation of this facility, Bradford Coal has caused, suffered and permitted the emission of fugitive contaminants, mainly in the form of coal dust, into the outdoor atmosphere, in violation of Chapter 123, §123.1 of the Department's Rules and Regulations.

9. Bradford Coal has not taken effective measures to prevent the emission of fugitive contaminants into the outdoor atmosphere.

Count II

10. The allegations of paragraphs one (1) through nine (9) are incorporated herein by reference.

11. Since October 26, 1972, Brdford Coal, in violation of §8 of the Air Pollution Act, 35 P.S. §4008, and Chapter 121, §121.7, of the Department's Rules and Regulations, has caused air pollution as defined in §3(5) of the Air Pollution Act, 35 P.S. §4003(5) in that emissions from its facility are:

(a) inimical to the public health, safety and welfare of residents of Bigler;

(b) injurious to human, plant and animal life, and to property in the vicinity of the facility; and

(c) unreasonably interferes with the comfortable enjoyment of life and property by residents of Bigler.

12. The emissions from the facility have caused the national primary and secondary ambient air quality standards for suspended particulate matter (maximum 24-hour concentration) as set forth in 40 CFR §§50.7, 50.8 and incorporated into Chapter 131, §131.2 of the Department's Rules and Regulations, to be exceeded, which has prevented the attainment and maintenance of national ambient air quality standards in that area.

Count III

13. The allegations of paragraphs one (1) through twelve (12) are incorporated herein by reference.

14. Since October 26, 1972, Bradford Coal has expanded its facility at the Bigler site in a manner to cause greater amounts of fugitive emissions, without first obtaining a permit from the Department, in violation of §6.1 of the Air Pollution Act, 35 P.S. §4006.1, and Chapter 127, §127.11 of the Department's Rules and Regulations.

WHEREFORE, the Department hereby requests that the Board assess a civil penalty for said continuous, wilful violations upon Bradford Coal in an amount based upon:

(a) the damage or injury to the outdoor atmosphere of the Commonwealth or its uses resulting from Bradford Coal's unlawful conduct alleged herein; and

(b) the economic benefit gained by Bradford Coal as a result of the unlawful conduct alleged herein; and

(c) the expenses incurred by the Department in its effort to secure Bradford Coal's compliance with the duties imposed on it by law and the cessation of the unlawful conduct alleged herein; and

(d) the degree of culpability associated with Bradford Coal's unlawful conduct and which is sufficient to deter such unlawful conduct in the future; and

(e) other relevant factors.

Respectfully submitted,

/s/ THOMAS Y. AU

Thomas Y. Au
Assistant Attorney General

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CRAWFORD

AFFIDAVIT

Larry W. Wonders, being duly sworn, deposes and says that he is the Regional Air Pollution Control Engineer, Region VI, Bureau of Air Quality and Noise Control of the Department of Environmental Resources; that he makes this affidavit on behalf of the complainant, being authorized to do so; and that the facts set forth in the foregoing Complaint for Civil Penalties are true upon his information and belief.

/s/ LARRY W. WONDERS
Larry W. Wonders

Sworn to and subscribed before
me this 23rd day of July, 1976.

/s/ VIOLA M. HODGES
Notary Public
Viola M. Hodges
NOTARY PUBLIC
My commission expires Feb. 14, 1977

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF
ENVIRONMENTAL RESOURCES

CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is made between the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "Department") and Bradford Coal Company, Inc. (hereinafter "Bradford Coal"), a Pennsylvania corporation, with its principal place of business in Bigler, Pennsylvania, and Bradford Coal's successors in interest, assigns, and agents.

WHEREAS, the Commonwealth of Pennsylvania, Department of Environmental Resources, has found and determined the following:

A. Bradford Coal owns and operates a coal cleaning and storage facility in Bigler, Pennsylvania, which facility includes coal crushing operations, screens, conveyors, stacker, loading and unloading facilities, and storage areas;

B. Bradford Coal has emitted fugitive emissions from time to time from its various coal cleaning and storage operations;

C. Emissions from Bradford Coal's various coal cleaning and storage operations have at various times caused ambient air quality standards for suspended particulate matter and settleable particulate matter to be exceeded;

D. Bradford Coal has modified its operations and facilities without permission from the Department;

E. The Department's findings and determinations of violations of the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq. (hereinafter the "Act"), are actionable under said Act, which Act provides for civil and criminal penalties;

WHEREAS, Bradford Coal admits to none of the aforesaid violations of the Air Pollution Control Act and furthermore, Bradford Coal specifically denies all of the aforesaid violations;

WHEREAS, the Department filed a complaint for civil penalties before the Environmental Hearing Board on August 2, 1976, EHB Docket No. 76-096-CP-W, which is currently in litigation, for past violations of the Air Pollution Control Act;

WHEREAS, Bradford Coal has notified the Department that it intends to resolve the air pollution controversy between the Department and Bradford Coal by the cessation of operations at the existing coal cleaning and storage facility and the construction of a new coal cleaning and storage facility at another site on a schedule as expeditiously as possible, without prejudice, or benefit, thereby in any other legal action which is not the subject of this Consent Order and Agreement.

NOW, THEREFORE, the parties hereto, intending to be mutually bound by the covenants set forth in this Consent Order and Agreement, agree to the following:

ORDER

1. Paragraphs one (1) through twelve (12) of this Consent Order and Agreement shall constitute a final order of the Department, which is enforceable in any manner provided by law.

2. Bradford Coal shall submit to the Department's Bureau of Air Quality and Noise Control, Region VI, Meadville Office, plan approval applications for the construction of a new coal cleaning and storage facility, which applications meet the requirements of 25 Pa. Code §127.12. Section 127.12, *inter alia*, requires emissions which will be the

minimum attainable through the use of best available technology.

3. Should the Department determine, after it has received any application, that additional information is necessary, the Department shall notify Bradford Coal in writing and Bradford Coal shall submit such additional information within fifteen (15) days of receipt of notification.

4. Within sixty (60) days of receipt of all necessary information, but no later than October 15, 1977, the Department shall determine whether such plan approval application is approvable. Only after receipt of written plan approval from the Department shall Bradford Coal implement the provisions of the approved plan.

5.(a) Bradford Coal shall complete construction of the new facility in accordance with the approved plans and the new facility shall be completed by no later than December 31, 1979.

(b) Bradford Coal shall be permitted to operate the presently existing facility until July 1, 1979.

(c) After the presently existing facility is closed, no coal shall be stored at the closed site.

6. Upon notification of completion of the new coal cleaning and storage facility, the Department shall issue a temporary operating permit, pursuant to 25 Pa. Code §127.23.

7. Within thirty (30) days of issuance of a temporary operating permit, Bradford Coal shall submit an application for a determination of fugitive emissions of minor significance pursuant to 25 Pa. Code §123.1(a)(9) and a program for testing emissions. Bradford Coal will conduct such tests, as necessary to obtain an operating permit, to wit, (1) stack tests for particulate and sulfur dioxide at the boiler and ther-

mal dryer, (2) at the request of the Department, stack tests for particulate and sulfur dioxide on the control equipment at coal crusher screens, truck loading station, and conveyor belt transfer point to the cleaning plant and (3) ambient air sampling by hi-volume samplers and dustfall collectors for particulate.

8. During the implementation of the construction schedule under this Consent Order and Agreement, Bradford Coal shall take all reasonable interim measures at the existing site to keep fugitive emissions to a minimum, including full utilization of current equipment and operating practices, including the following:

(a) Stockpiles of coal shall be limited to the existing area and in no event shall coal be stored at a level higher than the nearest fence, including existing fences and new fences to be constructed, in accordance with "Exhibit A" attached hereto. All dikes and fences around the stockpiles shall be maintained in good repair. (The Department does not hereby condone expansion of storage areas since 1971.) No coal shall be stored in any area other than the existing area, marked in "Exhibit A," unless Bradford Coal obtains a temporary operating permit for storage of coal at the new site.

(b) All entry and exit routes for trucks carrying coal to and from the existing facility or new facility shall be cleaned and maintained by oiling, dust suppressing chemicals, water spray or vacuum cleaner, as road conditions and weather conditions necessitate.

(c) Any spillage of coal from trucks shall be removed promptly from roads adjacent to the existing facility.

(d) All loaded trucks carrying coal entering or existing from the existing facility shall be tarped, except for truck picking up house coal.

(e) All existing equipment and structures shall be maintained in proper working condition. Bradford Coal shall

only use the existing conveyor transport facilities to load railroad cars until Bradford Coal obtains a temporary operating permit to load railroad cars at the new facility.

(f) Any spillage of coal on property owned by Bradford Coal outside existing plant buildings, storage area, or conveyors shall be removed promptly.

(g) Front end loaders utilized at the existing facility shall be operated at all times so as to minimize emissions during the loading and moving of coal in the coal handling areas.

(h) By July 1, 1978, evergreen trees shall be planted along Bradford Coal's common property line with lands owned by Helen Peters and located between State Route 970 and the Conrail Railroad tracks to form a tree barrier between Bigler and the proposed new facility.

9. Plans and schedules for construction of the new facility, as approved by the Department, shall be incorporated into this Court Order and Agreement.

10. During the implementation of any of the measures outlined in Paragraphs one (1) through twelve (12), and until a final permit is issued, Bradford Coal shall submit to the Department, through the Regional Air Pollution Control Engineer, Bureau of Air Quality and Noise Control, Meadville, quarterly reports signed by a responsible official of the company detailing the work accomplished.

11. After such commencement of operations of the new facility, should Bradford Coal have to cease operation of the new facility due to breakdown of equipment, Bradford Coal shall be permitted to operate the presently existing facility for such period as the new facility is not operational, but only if such operations at the existing facility do not extend beyond a six month period from the issuance of a temporary operating permit for the new facility, or beyond the date Bradford Coal receives a final operating permit for the new

facility, whichever first occurs. Any operating of the presently exisiting facility beyond July 1, 1979 shall be subject to noncompliance penalties of Section 120 of the Clean Air Act.

12. Within one year of the initial date of issuance of a temporary operating permit, Bradford Coal shall pave all access roads and loading and unloading areas to the new facility.

AGREEMENT

13. In settlement of the alleged violations of the Pennsylvania Air Pollution Control Act specified in the complaint for Civil Penalties, EHB Docket No. 76-096-CP-W, for a period from October 23, 1972 until the date of execution of this Consent Order and Agreement, Bradford Coal shall pay to the Pennsylvania Clean Air Fund the sum of ten thousand dollars ($10,000.00). Bradford Coal shall pay three thousand three hundred thirty four dollars ($3,334.00) within thirty (30) days of the execution of this Agreement, the Bradford Coal shall pay two additional payments of three thousand three hundred thirty three dollars ($3,333.00), one on each of the next two anniversary dates of this Agreement. Payment required herein shall be made payable to the Pennsylvania Clean Air Fund, and should be forwarded to Mr. M. F. Robinson, Administrative Officer, Bureau of Air Quality and Noise Control, P.O. Box 2063, Fulton National Bank Building, Harrisburg, Pennsylvania 17120. Bradford Coal does not admit by such payment that such violations have occurred.

14. Within ten (10) days of the date when plan approval is granted, Bradford Coal shall submit to the Department's Bureau of Air Quality and Noise Control, Region VI Office, Meadville, two collateral bonds, in the amount of fifty thousand dollars ($50,000.00) each, to guarantee faithful compliance with Paragraphs 5(a) and 5(b) of this Consent Order and Agreement.

15. Prior to the transfer by Bradford Coal of any legal or equitable interest in the presently existing facility, Bradford Coal shall present a copy of this Consent Order and Agreement on the prospective successor in interest. The provisions of this Consent Order and Agreement shall remain in full force and effect between the Department and any successor in interest of Bradford Coal.

16. This Consent Order and Agreement shall remain in full force and effect until a final operating permit pursuant to 25 Pa. Code §127.21 is issued for the new facility.

17. As long as Bradford Coal fully complies with all the provisions and requirements set forth in this Consent Order and Agreement within the time specified for such performance, the Department will not institute any enforcement action for the violations of the Act which are the subjects of the Complaint for Civil Penalties, but if Bradford Coal fails to comply with any of the provisions and requirements in this Consent Order and Agreement in a timely manner, the Department may institute any enforcement action and exercise available remedies, including administrative, civil or criminal actions and actions for civil penalties for noncompliance with this Consent Order and Agreement and for violations of the Act and the rules and regulations promulgated thereunder, except that the Department shall not revoke plan approval to construct the new facility, as a remedy for violation of this Consent Order and Agreement. Bradford Coal shall have no immunity from activities causing any violations of the Act or regulations at the site of the new facility during the period between the date of execution of this Consent Order and Agreement and the date of completion of construction.

18. Bradford Coal shall obtain extensions of temporary operating permits as necessary to demonstrate compliance at the new facility for a period of one year of the initial date

of issuance of the temporary operating permit. During this one (1) year period, the Department agrees not to institute enforcement action for violations of the Act, and the rules and regulations promulgated thereunder at the existing facility or at the new facility as long as (1) Bradford Coal is only operating one facility, (2) Bradford Coal is taking all appropriate steps to achieve compliance at the new facility, and (3) Bradford Coal is complying with all other provisions of this Consent Order and Agreement.

19. If the Department denies a final operating permit, Bradford Coal shall have the right to appeal such decision to the Environmental Hearing Board and appellate court in accordance with the provisions of applicable law.

20. Nothing contained in this Consent Order and Agreement shall be construed to imply that the Department waives its right to institute enforcement action for any violations of the statutes, rules and regulations of the Department that may result from Bradford Coal's operations, except for those violations described in the Whereas clauses above. Bradford Coal does not admit that such violations have occurred. However, should any other violations of law occur not covered by this Consent Order and Agreement, it shall not constitute a breach of this Consent Order and Agreement.

21. Paragraphs 5(a), 6, 7, 8(h), 11 and 12 of this Consent Order and Agreement shall be subject to the following *force majeure* clause: If Bradford Coal is obstructed or delayed in the commencement, prosecution, completion or implementation of its obligations by (1) act of God, fire, flood, lightning, cyclone or other unavoidable casualty; or (2) strikes, work stoppage or slow-downs which are not attributable to acts of Bradford Coal; but in no event shall any general strike, work stoppage or slowdown involving the mining industry as a whole or in Clearfield County and contiguous

counties be attributable to Bradford Coal; or (3) delays by vendors, contractors, or supplies due to (i) shortages of material, energy or equipment or (ii) delays in delivering of materials, energy or equipment for which Bradford Coal cannot substitute; or (4) unavoidable start-up or break in equipment problems at the new facility, and which problems cannot be solved by the installation of substitute equipment at reasonable cost, (5) an order of a court of competent jurisdiction, then Bradford Coal shall be excused from fulfilling such obligations affected by the delay for a period of time equal to the period of time caused by delay, provided, however, that the following requirements are met: (i) By letter postmarked on or before the last day of each month, Bradford Coal shall report any delay incurred due to a *force majeure* event; (ii) Bradford Coal shall submit copies of any records, papers or correspondence, in its possession or available to it, substantiating the cause of delay; (iii) Bradford Coal shall formally request an extension in writing (specifying which obligation the request is sought) at any time prior to a performance date, but only for causes of delay which were timely reported to the Department pursuant to this paragraph. Upon cause having been shown and documented, the Department shall extend the date or dates for performance equal to the period of time of the delay. The Department's action on such request may be appealed by Bradford Coal to the Environmental Hearing Board under applicable law.

22. In the event that Bradford Coal fails to complete construction of the new facility by December 31, 1979, unless the failure is excused by an extension of time obtained pursuant to Paragraph 21 of this Consent Order and Agreement, Bradford Coal shall forfeit to the Clean Air Fund its collateral bond in the sum of fifty thousand dollars ($50,000.00). In the event that Bradford Coal fails to terminate the operation of the presently existing facility by July 1,

1979, Bradford Coal shall immediately forfeit to the Clean Air Fund its collateral bond in the sum of fifty thousand dollars ($50,000.00).

23. It is the intent of the parties hereto that the clauses hereof are severable, and should any part of this Consent Order and Ageement be declared by a court of law to be invalid and unenforceable, the other clauses shall remain in full force and effect. It is the intent that this Consent Order and Agreement be construed so as to effectuate the purposes and limitations of the Pennsylvania Air Pollution Control Act, as amended, and the Clean Air Act, 42 U.S.C. §1857, et seq., as amended, and that the provisions of this Consent Order and Agreement, if inconsistent, be amended so as to be consistent with applicable law.

24. The execution of this Consent Order and Agreement shall operate to terminate all prior agreements, consent decrees, stipulations and actions between the Department and Bradford Coal for violations of the Air Pollution Control Act and for maintenance of a common law public nuisance. Nothing herein shall be construed to mean that the Department condones any past violations of the Air Pollution Control Act, or condones action by Bradford Coal under color of any prior agreement, consent decree, stipulation or action. Nothing herein shall be construed to mean that Bradford Coal admits to any violation of law.

Entered into and agreed to by the Commonwealth of Pennsylvania, Department of Environmental Resources and Bradford Coal Company, Inc., this 13th day of October, 1977.

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL RESOURCES

/s/ THOMAS Y. AU

Thomas Y. Au
Assistant Attorney General

/s/ MORRIS MALIN

Morris Malin
Chief, Division of
Abatement and Compliance
Bureau of Air Quality & Noise Control

/s/ LARRY W. WONDERS

Larry W. Wonders
Regional Air Pollution Control Engineer
Bureau of Air Quality & Noise Control

FOR BRADFORD COAL COMPANY, INC.

/s/ C. ALAN WALKER
President

/s/ WILLIAM C. KRINER
Attorney

ENVIRONMENTAL HEARING BOARD

/s/ PAUL E. WATERS
Paul E. Waters
Chairman

/s/ JOANNE R. DENWORTH
Joanne R. Denworth
Member

DATED: November 14, 1977

EXHIBIT "C"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Air Quality and Noise Control

PLAN APPROVAL

Bradford Coal Company
Bigler, PA 16825

Attention:
Mr. C. Alan Walker
President

Approval No.:
17-305-00011
Source:
Bearce Coal Dryer

Mfr. of Source:
Indiana Steel & Fabricating
Mfr. of Air Cleaning Device:
Environeering, Inc.
A-33-026
Location:
Bradford Township
Clearfield County

In accordance with provisions of the Air Pollution Control Act, the Act of January 8, 1960, P. L. 2119, as amended, and with Chapter 127 of the Rules and Regulations of the Department of Environmental Resources, the Department on October 14, 1977 approved plans for construction of the above indicated air contamination source.

The plan approved is subject to the following conditions:

A. General

(1) The source is to be constructed in accordance with the plans submitted with the application.

B. Special

(1) This PLAN APPROVAL expires (See Attached).

Notify the person noted below when the installation is completed so that the source can be inspected for issuance of an OPERATING PERMIT.

NOTE:
ppm

/s/ LARRY H. KENDUS
Regional Air Pollution Control Engineer

1. This plan approval expires December 31, 1979.
2. On or before December 31, 1979 a temporary operating permit shall be obtained from the Department, at the name and address given below, so that this source can be stack tested, as required by condition No. 4 of this plan approval.
3. On or before October 31, 1979 a test procedure and a sketch with dimensions indicating the location of sampling ports and other data to ensure the collection of representative samples shall be submitted to the Department, at the name and address given below.
4. On or before March 1, 1980 or within 60 days of the start up of the unit, whichever occurs earlier, a stack test(s) shall be performed in accordance with the provisions of Chapter 139 to show compliance with Section 123.11 and 123.22 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources. The stack test shall be performed while the aforementioned source is operating at the maximum rated capacity as stated on the application.

5. At least two weeks prior to the test, the Department shall be informed of the date and time of the test.
6. On or before April 1, 1980 or within 30 days after completion of the test, whichever occurs earlier, two copies of the complete test report, including all operating conditions, shall be submitted to the Department, at the name and address given below, for approval.
7. Equipment shall be provided so that at the request of the Department the following can be measured:
   (a) pressure drop across the venturi throat, utilizing a differential manometer, or equivalent.
   (b) water flow rate to the scrubber, utilizing a rotameter, or equivalent.
8. An operating pressurer drop of at least 20 inches w.g. shall be maintained across the throat of the venturi scrubber and a water flow rate of 180 g.p.m. to the scrubber shall be maintained.
9. The stack height for the exhaust of the products of combustion from this unit shall be at least 100 feet above ground level.
10. Issuance of an operating permit is contingent upon satisfactory compliance with condition nos. 2 through 9 above, upon the source being constructed and operated as stated on the application, and upon satisfactory demonstration that the emissions from the source will not be in violation of applicable Rules and Regulations of the Department of Environmental Resources.
11. Any information required to be submitted as part of the above conditions should be submitted to:

Mr. William J. Charlton, Chief
Engineering Services Section
Bureau of Air Quality
and Noise Control
Meadville Regional Office
1012 Water Street
Meadville, PA 16335

EXHIBIT "D"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Air Quality and Noise Control

PLAN APPROVAL

Bradford Coal Company, Incorporated Bigler, Pennsylvania 16825	Approval No. 17-305-00012 Source: Coal Crushing and Screening Station Mfr. of Source: Indiana Steel and Fabricating Co., Inc. Mfr. of Air Cleaning Device: Riley Environeering, Inc. Model A-33-14000 Location: Bradford Township Clearfield County
Attention: Mr. C. Alan Walker President	

In accordance with provisions of the Air Pollution Control Act, the Act of January 8, 1960, P. L. 2119, as amended, and with Chapter 127 of the Rules and Regulations of the Department of Environmental Resources, the Department on October 14, 1977 approved plans for construction the above indicated air contamination source.

The plan approved is subject to the following conditions:

A. General

(1) The source is to be constructed in accordance with the plans submitted with the application.

B. Special

(1) This PLAN APPROVAL expires (see attachment).

Notify the person noted below when the installation is completed so that the source can be inspected for issuance of an OPERATING PERMIT.

NOTE:

/s/ LARRY H. KENDUS
Regional Air Pollution Control Engineer

1. This plan approval expires December 31, 1979.
2. On or before December 31, 1979 a temporary operating permit shall be obtained from the Department so that this source can be stack tested, as required by condition No. 4 of this Plan Approval.
3. On or before October 31, 1979 a test procedure and a sketch with dimensions indicating the location of sampling ports and other data to ensure the collection of representative samples shall be submitted to the Department.
4. On or before March 1, 1980 or within sixty (60) days of the construction of the unit, whichever occurs earlier, a stack test shall be performed in accordance with the provisions of Chapter 139 to show compliance with Section 123.13 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources. The stack test shall be performed while the aforementioned source is operating at the maximum rated capacity as stated on the application.
5. At least two weeks prior to the test, the Department shall be informed of the date and time of the test.

6. On or before April 11, 1980 or within thirty (30) days after completion of the test, whichever occurs earlier, two copies of the complete test report, including all operating conditions, shall be submitted to the Department for approval.

7. If visual inspection by Department personnel indicates that the emissions from the source are in compliance with applicable Rules and Regulations of the Department of Environmental Resources, then the Company need not perform a stack test as required by Condition No. 4 above.

8. Issuance of an operating permit is contingent upon satisfactory compliance with Condition Nos. 2 through 7 above, upon satisfactory demonstration that the emissions from the source will not be in violation of applicable Rules and Regulations of the Department of Environmental Resources.

9. Any information required to be submitted as part of the above conditions should be submitted to Mr. William J. Charlton, Chief, Engineering Services Section Bureau of Air Quality and Noise Control, 1012 Water Street, Meadville, Pennsylvania, 16335.

LWW/bg

EXHIBIT "E"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Air Quality and Noise Control

PLAN APPROVAL

Bradford Coal Company
Bigler, Pennsylvania 16825

Attention:
Mr. C. Alan Walker
President

Approval No.:
17-305-00013
Source:
See Attachment
Mfr. of
Air Cleaning Device:
See Attachment
Location:
Bradford Township
Clearfield County

In accordance with provisions of the Air Pollution Control Act, the Act of January 8, 1960, P. L. 2119, as amended, and with Chapter 127 of the Rules and Regulations of the Department of Environmental Resources, the Department on October 14, 1977 approved plans for construction of the above indicated air contamination source.

The plan approved is subject to the following conditions:

A. General

(1) The source is to be constructed in accordance with the plans submitted with the application.

B. Special

(1) This PLAN APPROVAL expires (see attachment).

Notify the person noted below when the installation is completed so that the source can be inspected for issuance of an OPERATING PERMIT.

NOTE:

/s/ Larry H. Kendus
Regional Air Pollution Control Engineer

Sources	*Control Equipment*
Railroad Loadout	
Coal Stockpiles	
Roadways	
Truck Dump Area	Riley Environeering, Inc. Model A-33-46000
Truck Loading Area	Riley Environeering, Inc. Model A-33-10000
Preparation Plant Conveyor Transfer Point	Riley Environeering, Inc. Model A-33-4000

B. Special Continued:

1. This Plan Approval expires December 31, 1979.
2. The access road from LR 17121 (Pa. Route 970) is to be used for coal trucks only to avoid transporting coal through Bigler or Woodland.
3. All roadways and traffic areas at the plant shall be paved within one year of the start of operations and such paved roads and traffic areas shall be maintained in such a manner as to prevent fugitive emissions from their use.

4. Until paved, all roads and traffic areas at the plant shall be treated with dust suppressants to prevent fugitive emissions from their use.
5. Equipment in the stockpile areas shall only be used for pushing coal in dead storage areas of the stockpiles into the hoppers feeding the reclaim tunnels.
6. A water line shall be installed and equipment available in the raw coal storage area to wet the storage piles as needed to prevent fugitive emissions.
7. At least 90 days prior to commencement of operation, Bradford Coal shall submit to the Department for approval a comprehensive plan for sampling of ambient air in the vicinity of the new plant. This plan shall provide for the collection of sufficient data in a reliable manner as to enable the Department of Environmental Resources to determine if Bradford's operation will result in the creation of ambient levels of air contaminants in excess of those levels set forth in 25 Pa. Code 131.2 and 131.3. This sampling program must be of sufficient scope and duration as to be representative of year round operation. In addition, this plan shall specifically disclose the following:
   a. The types and numbers of sampling devices to be utilized.
   b. The location of each device in relation to storage piles, cleaning plant, loading area, property lines, etc.
   c. The duration and frequency of sampling.
   d. The procedures for collection and laboratory analysis of the samples.
   e. Other relevant information, data, or discussion.
8. Within 30 days of completion of the sampling program, a report shall be submitted to the Department summa-

rizing the results. This report shall specifically disclose the following:

a. Meteorological records and/or observations taken at appropriate intervals.

b. Operational status of the plant during sampling periods.

c. Interpretation of results through comparison with the applicable regulations referenced in Condition No. 7 above.

d. Estimates with supporting calculations of sampling errors.

e. Any other relevant information, data, or discussion.

9. On or before December 31, 1979, a temporary operating permit shall be obtained from the Department so that the plant may be operated during implementation of the sampling program required by Condition No. 7.

10. Issuance of an operating permit is contingent upon satisfactory compliance with Conditions 2 through 9 above, upon the plant being constructed and operated as stated in the application and the additional information submitted, and upon satisfactory demonstration that the emissions from the plant will not be in violation of applicable Rules and Regulations of the Department of Environmental Resources.

11. Any information required to be submitted as part of the above conditions should be submitted to Mr. William J. Charlton, Chief, Engineering Services Section, Bureau of Air Quality and Noise Control, 1012 Water Street, Meadville, Pennsylvania, 16335.

LWW/bg

EXHIBIT "F"

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Air Quality and Noise Control

PLAN APPROVAL

Bradford Coal Company
Bigler, Pa. 16825

Attention:
Mr. C. Alan Walker
President

Approval No.
17-302-0008
Source:
Boiler (coal/oil fired)
Mfr. of Source:
Burnham
Mfr. of Air
Cleaning Device:
See Attachment
Location:
Bradford Township
Clearfield County

In accordance with provisions of the Air Pollution Control Act, the Act of January 8, 1960, P. L. 2119, as amended, and with Chapter 127 of the Rules and Regulations of the Department of Environmental Resources, the Department on October 14, 1977 approved plans for construction of the above indicated air contamination source.

The plan approved is subject to the following conditions:

A. General

(1) The source is to be constructed in accordance with the plans submitted with the application.

B. Special

(1) This PLAN APPROVAL expires (See Attached).

Notify the person noted below when the installation is completed so that the source can be inspected for issuance of an OPERATING PERMIT.

NOTE:

/s/ Larry H. Kendus
Regional Air Pollution Control Engineer

1. This plan approval expires December 31, 1979.
2. On or before December 31, 1979 a temporary operating permit shall be obtained from the Department, at the name and address given below, so that this source can be stack tested, as required by condition No. 4 of this plan approval.
3. On or before October 31, 1979 a test procedure and a sketch with dimensions indicating the location of sampling port and other data to ensure the collection of representative samples shall be submitted to the Department, at the name and address given below.
4. On or before March 1, 1980 or within 60 days of the start up of the unit, whichever occurs earlier, a stack test(s) shall be performed in accordance with the provisions of Chapter 139 to show compliance with Section 123.11 and 123.22 of Chapter 123 of the Rules and Regulations of the Department of Environmental Resources. The stack test shall be performed while the aforementioned source is operating at the maximum rated capacity as stated on the application.
5. At least two weeks prior to the test, the Department shall be informed of the date and time of the test.
6. On or before April 1, 1980 or within 30 days after completion of the test, whichever occurs earlier, two copies

of the complete test report, including all operating conditions, shall be submitted to the Department, at the name and address given below, for approval.

7. The boiler is to be constructed with all the facilities necessary to fire oil.
8. Issuance of an operating permit is contingent upon satisfactory compliance with condition nos. 2 through 7 above, upon the source being constructed and operated as stated on the application, and upon satisfactory demonstration that the emissions from the source will not be in violation of applicable Rules and Regulations of the Department of Environmental Resources.
9. Any information required to be submitted as part of the above conditions should be submitted to:

Mr. William J. Charlton, Chief
Engineering Services Section
Bureau of Air Quality and Noise Control
Meadville Regional Office
1012 Water Street
Meadville, Pennsylvania 16335

Before the Environmental Hearing Board of Pennsylvania

IN THE MATTER OF:

Bradford Coal Company, Inc. Appeal From Permit And Consent Order — No. 77-180-B

NOTICE OF APPEAL

1. The appellants herein are Doris J. Baughman, Mabel E. Bock, Violet Dixon, Robert R. and Donna Ellinger, George and Ruth Elinsky, Hollis N. and Dorothy Jean Knepp, Harold O. and Lorraine Lansberry, James and Catherine Lombardo, Howard C. and Loraine G. Shaffer, Richard Edmund and Emmabell Swanson, Lyle A. and Ruth S. Miller, Abram B. And Mabel L. Wisor, Abe B. and Leda Jane Wisor and Thomas Irvin and Carol Shelia Wisor. All of the above appellants own property in and/or reside in Bigler, Pennsylvania in close proximity to the present and proposed coal processing plant of Bradford Coal Company, Inc.

2. This appeal is from the Consent Order and Agreement between the Department of Environmental Resources and Bradford Coal Company, Inc. dated October 13, 1977 (Exhibit A hereto) and the Plan Aprovals 17-302-00008, 17-305,00011, 17-305-00012 and 17-305-00013 which were issued to Bradford Coal Company, Inc. on October 13, 1977 (Exhibit B hereto).

3. Appellants object to the Consent Order and Plan Approvals for the following reasons:

a. The Consent Order and Plan Approvals are all in violation of Sections 3(5) and 8 of the Pennsylvania Air Pollution Control Act, 35 P.S. 4003(5) and 4008 and Sections 121.7, 123.1, 123.2,123.11, 123.13, 123.22, 131.2 and 131.3 of the

Rules and Regulations thereunder inasmuch as those provisions of the aforecited Act and Regulations will not be complied with under the terms and conditions of the Consent Order and Plan Approvals.

b. The Consent Order and Plan Approvals do not meet the requirements of Section 6.1 of the Air Pollution Control Act, 35 P.S. 4006.1 and Sections 127.1, 127.11, 127.12, 127.21 and 127.32 of the Rules and Regulations thereunder.

c. The Consent Order and Plan Approvals have been entered into and issued by the Department of Environmental Resources in violation of Article 1, Section 27 of the Pennsylvania Constitution.

d. The Consent Order and Plan Approvals have been entered into and issued by the Department of Environmental Resources in violation of the Pennsylvania Implementation Plan filed pursuant to the Clean Air Act Amendments of 1970 and Part C of the Clean Air Act Amendments of 1977.

WHEREFORE, it is respectfully requested that this Board:

1. Revoke the Plan Approvals prior to hearing to preserve the status quo;

2. After hearing, revoke the plan approvals;

3. After hearing, order that the Consent Order is null and void; and

4. Grant such other relief as this Board decides is necessary to effect the purposes of this appeal.

/s/ MARVIN A. FEIN

Marvin A. Fein
313 City-County Building
Pittsburgh, Pennsylvania 15219
(412) 255-2019
Attorney for the appellants

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD
Blackstone Building
First Floor Annex
Harrisburg, Pennsylvania 17101
(717) 787-3483

DORIS J. BAUGHMAN, ET AL
v.
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES & BRADFORD COAL COMPANY

Docket No. 77-180-B
Air Pollution Control Act Article I, Section 27

ADJUDICATION

By Thomas M. Burke, Member, January 26, 1979:

Bradford Coal Company Inc., (Bradford) intervenor in this matter, owns and operates a coal cleaning and storage plant in the village of Bigler, Bradford Township, Clearfield County. Coal dust emissions from the plant have caused, since at least 1963, a general condition of air pollution to exist in the village of Bigler. After a period of negotiations the Department of Environmental Resources (DER) and Bradford, on October 13, 1977, entered into a consent order and agreement (consent order) which requires Bradford to cease the operation of its coal cleaning plant by July 1, 1979, and provides for the construction of a new coal cleaning plant, approximately 3,000 feet northwest of the existing plant in Bradford Township. The DER on October 14, 1977, issued plan approvals under Section 6.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001, *et seq.*, (APCA), to construct the new coal cleaning plant.

Twenty-three separate appeals were filed by Bigler residents including one filed by counsel on behalf of twenty-five individuals. Nineteen of the appeals were dismissed prior to hearing for failure to comply with the rules of the board. The appeal of Edward A. And Dolores Antonuk was withdrawn by letter dated April 8, 1978, and the appeal of Clifford Welker is dismissed at this time for failure of Mr. Welker to appear at hearings. The remaining appeals are those of the twenty-five residents of Bradford represented by counsel and that of Mr. and Mrs. Donald C. Homman (jointly referred to herein as appellants).

Appellants aver that the DER abused its discretion by entering into an agreement with Bradford which permits the continued operation of the coal cleaning plant in noncompliance with the law and that the DER abused its discretion and violated its statutory and regulatory authority when it issued the plan approvals to Bradford to construct the new coal cleaning plant.

Four days of hearings were held in Pittsburgh. Apellants, the DER and intervenor, have filed proposed findings of fact and conclusions of law and briefs in support thereof. We now hereby enter the following:

FINDINGS OF FACT

1. Appellants are persons who own property and reside in the village of Bigler, Bradford Township, Clearfield County, Pennsylvania.

2. Appellee is the Department of Environmental Resources, the agency authorized to administer the provisions of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*

3. Intervenor is Bradford Coal Company, Inc., a Pennsylvania corporation with its principal place of business in the village of Bigler, Bradford Township, Clearfield County.

4. Bradford Coal Company Inc. (Bradford) owns and operates a coal cleaning and storage facility in the village of Bigler, Bradford Township, Clearfield County (existing plant).

5. The existing plant was constructed in 1954. Since that time its operation has continually grown and over the years the coal storage area has continually expanded. In 1962, 266,000 tons of coal were processed at the plant; in 1976, 428,000 tons of coal were processed.

6. Bradford increased the coal stockpile area at the existing plant without a permit from the DER required by Section 6.1 of the APCA.

7. The existing plant includes coal crushing operations, screens, conveyors, stacker, raw and finished coal stockpiles, coal loading and unloading facilities, a wet cleaning plant and a coal fired boiler for heating the plant during the winter season.

8. Coal dust emissions from the existing plant cause a general condition of air pollution, as that term is defined by Section 3(5) of the APCA, to exist in the village of Bigler.

9. Residents of the village of Bigler in the vicinity of the existing plant have been inundated with coal dust from the existing plant. The coal dust covers and soils the outsides of their houses and properties, prevents the opening of windows in the summertime, is tracked inside the houses and generally interferes with the comfortable enjoyment of life and property.

10. Coal dust emissions from the existing plant are caused by:

(a) dust arising from roadways because of the continuous pulverizing of coal by the movement of traffic;

(b) the loading of trucks and railroad cars by front-end loaders and high-lifts;

(c) the shaking and breaking of coal in the crushing and screening operation;

(d) the unloading of coal from trucks;

(e) the malfunctioning of the coal storage pile stacker causing coal to drop from top of stacker;

(f) transfer points on conveyors, i.e. where coal drops off one conveyor onto another.

(g) wind blowing dust from coal storage piles.

11. The coal dust emissions from the existing plant are fugitive emissions, that is, emissions emitted into the outdoor atmosphere in a manner other than by a flue.

12. State Route 970 runs between the stockpile area and the cleaning facility area of the existing plant.

13. Ambient air quality standards for suspended and settleable particulate matter set to protect the public health have been exceeded in the area surrounding the existing plant.

14. Tests by the DER from May 8, 1975, to June 1, 1975, of the air quality in the vicinity of the existing plant resulted in the following readings of suspended solids in micrograms/m^3.

		High	*Low*	*Average*
(a) Marsh property	(approx. 50 feet north of plant)	497	34	195
(b) Wisor property	(approx. 50 feet east of plant)	490	45	199
(c) Lansberry property	(approx. 1,000 feet north of plant)	122	33	75
(d) Dixon property	(approx. 50 feet south of plant)	381	46	200
(e) Shaffer property	(approx. 1/3 mile east of plant)	163	66	115

15. The National Ambient Air Quality Standards for suspended solids promulgated by the administrator of the Environmental Protection Agency as necessary for the protection of the public health and incorporated as part of the standards of the DER at 25 Pa. Code §131.3 are: (a) 24 hour—260 micrograms/meter^3; (b) yearly average—75 micrograms/meter^3.

16. Tests by the DER for settleable particulate in the vicinity of the existing plant resulted in the following readings in tons per square mile.

	August 17—September 15, 1976	*September—October, 1976*
Marsh property	56	41
Wisor property	95	71
Lansberry property	17	40
Dixon property	void	143
Shaffer property	19	16

17. DER ambient air quality standards for settled solids are 42 tons/mile^2/month.

18. There are houses situated within 50-60 feet of the existing plant.

19. Because of its proximity to residents of the village of Bigler there is no reasonable way to repair the existing plant to prevent it from causing air pollution.

20. The only effective means of abatement of the nuisance caused by the existing plant is its closure.

21. The DER and Bradford entered into a consent order and agreement (consent order) on October 13, 1977, which provides for the closure of the existing plant and the construction of a new plant off Route 322 in Bradford Township approximately 3,000 feet northwest of the existing plant.

22. The consent order provides that the new plant is to be constructed by December 31, 1979, and that Bradford

may operate the existing plant until July 1, 1979; however, Bradford may resume operation of the existing plant due to malfunctions which prevent operations of the new plant, but only during a period of six months from the issuance of a temporary operating permit. Both plants cannot be operated at the same time.

23. If Bradford operates the existing plant for any reason after July 1, 1979, it will forfeit a fifty thousand dollar ($50,000) bond and be subject to noncompliance penalties, if any, of §120 of the Federal Clean Air Act Amendments of 1977.

24. Bradford is required by the consent order to implement "interim" coal dust control measures at the existing plant such as limiting the size of stockpiles, cleaning roads and controlling coal spillage. However, these measures are not expected to significantly improve the conditions in Bigler.

25. The new plant will be a coal cleaning and storage operation.

26. The new plant is proposed to be constructed on a 230 acre site. The operation of the new plant will use only about 25 of the 230 acres.

27. There is no zoning ordinance in Bradford Township.

28. The nearest house is 1200 feet from the closest coal processing area proposed for the new plant.

29. The potential emission sources at the new plant will be controlled.

30. The DER did not attempt to determine the level of noise which will exist at the proposed site and whether the noise therefrom will be inimical to the public well-being.

31. Bradford submitted applications to the DER for plan approvals for the new plant.

32. On October 14, 1977, the DER issued to Bradford Plan Approval No. 17-302-00008 for a coal/oil fired boiler at the new plant, Plan Approval No. 17-305-00011 for a coal dryer, Plan Approval No. 17-305-00012 for a coal crushing and screening station and Plan Approval No. 17-305-00013 for various fugitive emission sources such as railroad loadout, coal stockpiles, roadways, truck dump area, truck loading area and conveyor transfer point.

33. The DER did not do any air sampling to determine the ambient air quality in the vicinity of the site of the proposed plant.

34. Best available control technology is a concept which can include a number of equivalent technologies for emission control.

35. The conveyors to transport coal from one area to another at the new plant will be enclosed on three sides; they will not be enclosed at the bottom. The use of tube conveyors which would provide complete enclosure would result in additional control of emissions.

36. The emissions from the coal/oil fired boiler at the new plant will comply with applicable emission limitation standards.

37. The crushing and screening operations which reduce in size and separate the coal will be hooded and ducted to a scrubber.

38. Within one year of the start up of the new plant, Bradford must pave all roads at the site including all access roads and all loading and unloading areas. Until the roads are paved, they must be maintained with dust suppressants.

39. The paving of roads constitutes best available technology for controlling emissions from roads.

40. DER did not require Bradford to pave the roads on the site of the new plant prior to the commencement of its operation in order to allow time to determine where the traffic areas would be located.

41. The location of at least some of the roads at the new plant site, including the access roads, were known at the time of issuance of plan approval.

42. The truck unloading area at the new plant will be enclosed on three sides and hooded and ducted to a scrubber.

43. At the new plant coal is to be transported from the truck unloading area and the raw coal stockpile by an underground conveyor system. The underground conveyor system eliminates the use of high-lifts to move the coal and thus the excessive agitation of dust producing coal.

44. At the new plant the raw coal stockpile will be built with a radial stacker which eliminates the free fall of coal onto the stockpile.

45. At the new plant there will be no truck traffic flow through the plant or around the coal storage area.

46. The point where coal drops from the conveyor belt into the preparation plant is covered with a hood ducted to a small scrubber.

47. There will be coal stockpiled at the new facility on an area the approximate size of one-half of a football field.

48. A 65-foot high dike will be constructed between the village of Bigler and the proposed operation. The dike will extend from the railroad on the east to a 170-foot high wall on the west of the property, a distance of approximately 300 feet.

49. Trees will be planted on top of the dike. A water line with outlets at every 100 feet will be run across the top of the dike to water down the raw coal stockpile.

50. Trees will be planted along the boundary line between Helen Peter's property and the new plant. Trees exist on all other sides of the property.

51. The proposed control devices for the coal stockpiles at the proposed plant, i.e. the radial stacker, underground conveyor system, earthern dan to inhibit the wind, tree line and water line to wet down the pile, if necessary, are as effective at controlling emissions as are silos.

52. The DER made no study of the possible adverse environmental effects which could result from allowing a coal cleaning and storage plant to locate at the proposed site.

53. The DER made no study of the social and economic benefits of the proposed plant.

54. On-site roadways produce most emissions from a coal cleaning plant.

55. The coal/oil fired space heater boiler proposed for the new coal cleaning plant by Bradford is a minor source of emissions.

56. The type of coal/oil fired boiler proposed by Bradford as a space heater constitutes best available technology for the control of emissions.

57. Appellants are disturbed, particularly at night, by unreasonable noise levels at the Bigler coal cleaning plant.

DISCUSSION

The purpose of Bradford's coal cleaning plant at Bigler is the cleaning or removal of sulfur and ash from coal. The operation basically involves the crushing of the coal into fines, and the transporting of the fines to a liquid media where the waste is separated from the coal because of the difference in their specific gravity. The plant's operation, although simple, involves a constant movement of coal; it is

unloaded from trucks, moved by front end loaders and conveyor belts, and loaded onto trucks and railroad cars. This movement inevitably raises coal dust particles into the atmosphere. In particular, emissions of coal dust into the air from the Bigler coal cleaning plant are caused by: (a) dust arising from roadways because of the continuous pulverizing of coal by the movement of traffic; (b) loading of trucks and railroad cars by the front-end loaders and highlifts; (c) the shaking and breaking of coal in the crushing and screening operation; (d) the unloading of coal from trucks; (e) the dropping of coal onto the storage pile; (f) the transfer points on conveyors, i.e. the place where coal drops off one conveyor onto another; and (g) wind blowing coal dust from the storage piles.

The coal cleaning plant in Bigler was constructed by Bradford in 1954;[1] since that time, its operation has continually grown and its coal storage area has continually expanded. (The expansion has taken place, in part, without authorization from the DER.[2]) In 1962 Bradford processed 266,000 tons of coal at the plant; by 1976, it was processing 428,000 tons of coal per year. Residents of the village of Bigler have absorbed the brunt of the plant's growth as they have become inundated with coal dust from the coal cleaning plant. Houses and other properties have become soiled and covered with coal dust. The coal dust in the air discourages the opening of windows in the summertime and the use of yards for cook-outs and other recreations. It gets tracked into homes and generally interferes with the enjoyment of

[1]The present plant was erected in 1954; however, Bradford has operated a coal loading operation at the site since 1935.

[2]25 Pa. Code 127.11 prohibits the modification of an air contamination source without prior authorization by the DER. 25 Pa. Code 121.1 defines modification as a physical change which increases the amount of air contaminants emitted.

life and property in the vicinity of the plant. The testimony of Mrs. Donna Ellinger, who lives approximately 250 to 300 feet from the plant, is representative of the testimony of the 15 residents of Bigler who testified in this case. She described the coal dust emissions from the plant as follows:

> "I get coal dirt from the plant. I don't necessarily get dust. Sometimes it is more like ala chunky style. It is particles. I have heard it hit on the windows when the wind has blown it down, so it is big enough that I can hear it on the windows. It is in the house. You can go most anyplace in my house, even as soon as a half an hour after I have dusted, go like that (indicating), and you have coal dirt.
>
> "In the summertime, when we have the door open, our house is small and we can't afford air conditioning, so it is hot, and I open the doors, and before I prepare a meal, I must wash off the top of the stove, the sink and wipe off the table, and sometimes you have to dust the chairs, if you don't want your seat dirty. "NOTES OF TESTIMONY" p. 294

Also, tests by the DER of the quality of the air in the vicinity of the plant show that the ambient air quality standards for suspended particulate matter and settleable particulate set to protect the public health have been exceeded.

Appellants' problems are caused by two factors; first, the unconscionable failure of Bradford to install air pollution controls and to implement pollution control practices at the plant and second, and of overriding importance, the location of this twenty-three acre operation directly contiguous to a residential area. On three sides of the plant, there are homes within fifty feet of the operation.

The DER has been aware of the problems that Bradford's coal cleaning plant cause the residents of Bigler. In fact, the DER has received more complaints over a longer

period of time about Bradford's plant than any other source of air pollution in the region.[3] It has in the past taken some enforcement actions, none of which were effective in abating or alleviating the problem.[4] Finally, on October 13, 1977, after a period of negotiations and apparently in settlement of a civil penalty action the DER had filed against Bradford fourteen months earlier, the DER entered into a consent order and agreement (consent order) which provides for the shutdown of the Bigler coal cleaning plant and the construction of a new coal cleaning and storage plant approximately 3,000 feet northwest of the present plant. Specifically, the consent order provides that the new plant is to be constructed by December 31, 1979, and that Bradford may continue to operate the present plant until July 1, 1979. It also provides that Bradford may resume operations at the existing plant after July 1, 1979, if malfunctions occur at the proposed plant which prevent its operation, but only during a period of six months from the date of issuance of a temporary operating permit. Both plants cannot be operated at the same time.

Appellants, because they do not wish to continue to be subjected to the coal dust from the existing plant, because they believe the new plant will also cause a nuisance to their community and because of an understandable lack of trust in the good faith of Bradford and the DER, have appealed

---

[3]DER Region 6 is a 14-county area in the northwestern corner of the state.

[4]The DER brought one criminal complaint before a magistrate which resulted in a $100.00 fine. On July 17, 1968, it issued an administrative order to Bradford requiring the abatement of emissions from the plant. On December 14, 1970, it filed a Complaint in Equity in the Court of Common Pleas of Clearfield County requesting the Court to enjoin the operation of the plant until it complied with the APCA. The complaint resulted in a consent decree before the Court of Common Pleas of Clearfield County dated May 14, 1971, requiring Bradford to perform certain acts to abate emissions from the plant.

from the October 13, 1977, consent order and the plan approvals issued by the DER to Bradford to construct the proposed coal cleaning plant.

Our review of the DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Co. Inc. v. Comm. of Pa., DER*, 341 A.2d 556, 20 Pa. Commonwealth Court Ct. 186 (1975); *Pennsbury Village Condominium v. Com. of Pa., DER*, EHB Docket No. 76-057 (issued July 22, 1977).

CONSENT ORDER

Appellants object to the consent order for reason that the DER lacks the authority to agree to allow Bradford to operate the present coal cleaning plant in violation of the APCA.

Initially, it is true that conditions will not improve for the residents of Bigler under the consent order during the lifetime of the existing plant. Although paragraph 8 of the consent order requires Bradford to "take all reasonable interim measures at the existing site to keep fugitive emissions to a minimum" and lists specific operating practices which Bradford is required to perform such as limiting the size and height of stockpiles, cleaning and maintaining roadways with dust suppressant chemicals and tarping loaded trucks, the measures will not significantly alleviate appellants' coal dust problems.

It is clear that the DER has the authority to enter into a consent order. Section 4(4.1) of the APCA authorizes the DER to issue orders relating to air pollution. The fact that the terms of the order have, after negotiations, been agreed upon by the recipient prior to the order's issuance, does not alter the authority conferred by Section 4(4.1) *supra*. Also, the DER in its discretion has the authority to allow the operation of an air contamination source for a period of time while it achieves compliance. Section 4(4.1), *supra*, states in part that:

> "Such orders may specify a time for compliance, require submission of a proposed plan for compliance, and require submission of periodic reports concerning compliance."

Certainly it is within the DER's discretion to employ remedies for abating air pollution other than requiring the air pollution source to immediately shut down.

We find that appellants have not shown that DER has abused its discretion by allowing Bradford to operate the plant until July 1, 1979. Bradford during this period will be proceeding to construct a new plant further removed from Bigler and equipped with coal dust emission control equipment. Bradford has posted a $50,000 bond which it will forfeit if the plant is operated after July 1, 1979.[5]

PLAN APPROVALS FOR NEW PLANT

To install and operate an air contamination source in Pennsylvania, it is necessary to procure two permits from the DER; a plan approval permit prior to construction of the source and an operating permit after construction has been completed but prior to its operation. See Section 6.1 of the APCA.

Bradford applied for and received from the DER four plan approvals to construct the new plant. Plan Approval No. 17-302-00008 was issued for a coal/oil fired boiler, No. 17-305-00011 for a coal dryer, No. 17-305-00012 for the crushing and screening station and No. 17-305-00013 was

[5]See also 25 Pa. Code §141.4 wherein the DER is authorized to grant a variance from its air contaminant emission limitation regulations for a period of up to three years.

issued for various fugitive emission sources such as the stockpiles, roadways, loading and unloading areas. Appellants contend that the DER issued these plan approvals to Bradford even though the control devices or methods proposed by Bradford for controlling some of the emission points do not constitute the best available technology for minimizing emissions as required by 25 Pa. Code 127.12(a)(5). Section 127.12(a) states:

> "Applications for approval shall:
>
> . . .
>
> (5) Show that the emissions from a new source will be the minimum attainable through the use of best available technology."

Larry Wonders, the regional air pollution control engineer, and Francis Higgins, a field inspector of air pollution sources for the DER, both testified that the primary source of coal dust emissions from a coal cleaning plant is the on-site roadways. These emissions are generated by continuous truck traffic that pulverizes the coal spillage into coal fines which are picked up by the wind. Bradford's Plan Approval Permit No. 17-305-00013 requires the prevention of roadway coal dust emissions by the paving of the roads within one year of the start-up of the plant. During the initial year of operation, the emissions are to be prevented by treating the roads with dust suppressants.

Appellants argue that since dust from roadways is a primary source of fugitive emissions from the coal cleaning plant and inasmuch as the DER has determined that paved roads maintained to prevent the accumulation of dust constitute the best available technology for the control of the dust from roadways, the DER acted arbitrarily and contrary to law when it issued the plan approval permit to Bradford allowing Bradford to commence the operation of the plant and operate it for a year without the installation of best available technology, i.e. paved roads. The DER agrees that paved roads do constitute best available technology; however, it contends that it is justified in permitting Bradford to delay a year before paving the roads because until the plant is operating, the traffic flow, and thus the location of the roads will be unknown, as it takes a period of time to develop a traffic pattern at a coal cleaning plant. DER also points out that during the initial year the roadways will be maintained by dust suppressant chemicals. We find the DER's contention to be reasonable insofar as the road plan is unknown. However, testimony showed that the locations of some of the roadways such as access roads to the site are now known, and were known, at the time of the issuance of plan approval. In those cases we find that the roads must be paved prior to start-up of the plant. The requirement of 25 Pa. Code 127.12 that an applicant must show that the emissions will be the minimum attainable through the use of best available technology, presupposes that the source will not be operated until and unless it is equipped with the best available technology. Plan Approval No. 17-305-00013, because it does not require Bradford to install the best available technology for controlling emissions from the roadways, the location of which are known, prior to the commencement of the plant's operation, does not comply with 25 Pa. Code 127.12(a)(5). We therefore remand Plan Approval Permit No. 17-305-00013 to the DER to require the paving of all roads at the proposed site the location of which are known prior to the commencement of operation of the plant.

Appellants also contend that the DER has not required Bradford to use the best available technology to prevent the emissions of coal dust from the stockpiles. Appellants assert that the stockpiles must be enclosed to prevent windblown emissions therefrom. Their objection is based on their observations of coal dust being blown from the piles at the existing

plant and a letter addressing the stockpile emission problem from William Charlton, the DER engineer responsible for reviewing plan approval applications, to C. Alan Walker, the President of Bradford, dated August 5, 1977. The letter stated that:

> "...It is the Department's position that windblown fugitive emissions from stockpiled materials are best controlled through the use of some type of enclosure which positively prevents contact between ambient winds and the stockpiled material. This represents the best available control technology. We appreciate the difficulty that would be encountered in applying this technology in conjunction with a radial stacker, however we are also bound by 25 PA Code 127.1(5), that new air contamination sources must 'control the emission of air pollutants to the maximum extent, consistent with the best available technology'. Bradford may elect to propose some other control strategy, however it must be affirmatively demonstrated in the application that the alternative technology is equivalent to enclosing the piles in terms of fugitive dust prevention."

The DER and Bradford contend that the Bradford plan is equivalent to an enclosure for preventing fugitive emissions and thus constitutes best available technology.

The primary cause of fugitive emissions from stockpiles is agitation of the stockpile either through dumping coal onto the stockpile or removing coal from the pile. Bradford's plan is designed to prevent the generation of dust during loading and unloading. The coal will be placed on the pile by a radial stacker which will be automatically lowered to the actual height of the coal pile, thereby preventing the free fall of coal and resulting fugitive emissions. (The radial stacker is also an improvement over the tube stacker which is inclined to clog up during the winter from the freezing of coal.) High-lifts and front-end loaders will not be used for removing coal

from the stockpile; rather, the coal will be removed by a series of hoppers in the ground beneath the stockpiles which feed into an underground conveyor system, thus the agitation of the dust-producing coal will be eliminated.

To shield the stockpile from wind, Bradford is constructing a dike approximately 65 feet high and 300 feet long between Bigler and the stockpile. The dike will extend from the railroad on the east to a 170-foot highwall on the west of the property. Evergreen trees will be planted on top of the dike and a two-inch water line with outlets at every 100 feet will be run across the top of the dike to water down the stockpile, if needed. The stockpile, which is limited to a 55-foot height by the height of the radial stacker, will also be shielded from wind by a 170-foot highwall to the west and by the plant itself which is housed in a 73-foot building to the north.

The testimony presented on the issue of the effectiveness of this plan for preventing emissions from stockpiles as compared with an enclosure was from either DER or Bradford officials.[6] They testified that in their opinion Bradford's plan is as effective. Since we were unable to find that their opinions are in error, we find that in this case, the plan proposed by Bradford Coal constitutes best available technology for preventing emissions from the stockpiles.

Appellants also contend that the DER did not require the best available technology for control of emissions from the coal/oil fired space heating boiler. The boiler is a relatively minor source of emissions; the maximum particulate matter it is allowed to emit by DER regulation is 3.2 lbs/hour. The type of boiler proposed by Bradford has been recently developed for use without air pollution control equipment. The emissions are controlled by the adjustment

---

[6]The appellants called the DER officials as their witnesses.

of the combustion process to a level in compliance with the DER's regulations. Appellants argue that since the emissions can be reduced even further by the addition of air pollution control equipment, Bradford has not proposed best available technology.

The best available technology requirement does not require the addition of control devices in series, *ad infinitum*. The coal/oil boiler proposed by Bradford achieves emission control as well as a traditional boiler fitted with a control device. Thus, we believe that the DER did not abuse its discretion by denominating the boiler "best available technology", especially when the level of emissions will be less than 3.2 lb/hour.

Appellants also object to the use of a scrubber to control emissions from the crushing and screening station. Mr. Wonders testified that in his opinion a scrubber is less effective in reducing emissions than a bag house at the pressure drop proposed by Bradford, but that the scrubber can be made as efficient as a bag house if the pressure drop is increased, and that a bag house that is operated outdoors in the winter can have more maintenance problems than a scrubber. Based on Mr. Wonders' testimony, we find that the best available technology for control of emissions from the crusher and screening station is either a bag house or a scrubber with sufficient pressure drop to equal the bag house in removal efficiency. We, therefore, remand Plan Approval Permit No. 17-305-00012 to the DER to require either a bag house or a scrubber with a sufficient pressure drop to be as effective in the reduction of particulate matter emissions as a bag house.

Emissions from a conveyor belt are caused by wind blowing across the conveyor. Bradford proposes to prevent these emissions by installing a cover on the top side of the conveyor. Appellants contend that the best available technology for prevention of emissions from a conveyor constitutes total enclosure of the conveyor belts. The only testimony relevant to the issue is by Mr. Charlton, who testified that to his knowledge, one other coal cleaning plant uses a totally enclosed conveyor system and that, in his opinion, the fully enclosed system is more effective "to a very limited extent". Unfortunately, we do not know what Mr. Charlton means by "to a very limited extent" or how he applied it in his review of the application. Nor do we know whether such an enclosure "is available or can be made available" for this plant. Therefore, we remand Plan Approval Permit No. 17-305-00013 to the DER to determine the best available technology for control of emissions from the conveyor system taking into consideration Mr. Charlton's opinion that the enclosure is more effective. We also require the DER to explain the basis of its determination.

The DER, before it issues a plan approval for a new source, must determine that the new source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards. See 25 Pa. Code §127.1 which states in part:

> "It is intended that by the application of the provisions of this Article, air quality shall be maintained at existing levels in those areas where the existing ambient air quality is better than the applicable ambient air quality standards, and that air quality shall be improved to achieve the applicable ambient air quality standards in those areas where the existing air quality is worse than the applicable ambient air quality standards. In accordance with this intent it is the purpose of this Chapter to insure that all new sources shall conform to the applicable standards of this Article and that they shall not result in producing ambient air contaminant concentrations in excess of those specified in Chapter 131 of this Title (relating to ambient air quality standards)..."

25 Pa. Code §127.12 lists the contents of an application for plan approval. It states that: "When requested by the Department [an applicant must] show that the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards". See also Section 110 of the Federal Clean Air Act, 42 U.S.C.A. 7401 *et seq.*

Appellants contend that the DER could not have ascertained whether or not the proposed coal cleaning plant will adversely affect the attainment or maintenance of air quality standards because the DER did not conduct, or require Bradford to conduct, tests of the present quality of the air in the vicinity of the plant and without knowing the present air quality, it could not have determined what the quality of the air will be after installation and operation of the cleaning plant. The DER answers that it does not have to determine the affect of a new source of air quality at the plan approval stage but can wait until the review of the operating permit application. Here, DER has required Bradford to sample for air quality in the vicinity of the plant after it commences operations. A temporary operating permit will be issued to Bradford for the testing period. If the sampling shows that the emissions from the plant do not adversely affect the attainment or maintenance of air quality, Bradford will be issued an operating permit.[7] This air quality sampling program comports with the requirements of Section 6.1(b) of the APCA and 25 Pa. Code §127.22(a)(7) which requires an applicant for the operating permit to show that the source is capable of being operated in a manner as not to cause a violation of the air quality standards. However, it ignores the requirements for plan approval and defeats the purpose of the permitting process. The *raison d'etre* of the permitting process is the avoidance of risk; the avoidance of risk to the

[7]Assuming that Bradford has complied with all other provisions of the APCA and the applicable DER regulations.

community of air pollution as well as the avoidance of risk to the applicant of refusal of permission to operate after the construction of a source. The system may not be perfect, as a source for which a plan approval is granted may, nevertheless, cause air pollution and, thus, be denied an operating permit, however, pre-construction review is necessary to minimize the risk of such occurrences.

25 Pa. Code §127.12(a)(7) requires an applicant for a plan approval to show that the emissions from its source will not affect the attainment or maintenance of air quality when requested by the DER. We believe that the DER abuses its discretion when it has no way of knowing whether or not a source will affect the attainment or maintenance of air quality yet does not request the source to make a showing of same.

We do not know whether a determination of the affect of the emissions from the proposed plant on air quality can be made without sampling existing air quality, and thus, we do not hold that such a sampling program is necessary. We only hold that the DER did not attempt to determine the effect of the emissions from the Bradford's proposed plant on the attainment or maintenance of ambient air quality prior to issuing to Bradford the plan approval to construct the plant and that the DER must make such a determination, upon a reasonable basis, prior to issuing a plan approval.[8] We remand all four plan approvals to the DER in order that the DER can require Bradford to show that the emissions from the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards.

[8]The fact that the existing coal cleaning plant causes ambient air quality violations in the immediate vicinity of the plant shows that such a condition can result from emissions from a coal cleaning plant.

ARTICLE I, SECTION 27

Appellants contend that the DER acted contrary to Article I, Section 27 of the Pennsylvania Constitution because it entered into the consent order and issued the plan approvals without considering the adverse environmental effects of those actions. Article I, Section 27 of the Pennsylvania Constitution states:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

The courts have held that Article I, Section 27 is self-executing[9] and that its provisions require the DER, as trustee of the Commonwealth's public natural resources, to address the environmental impact of its actions by balancing their social and economic benefit with the environmental harm they cause. *Concerned Citizens for Orderly Progress, et al v. Comm. of PA, DER and Emerald Enterprises Limited,* ___ Pa. Commonwealth Court ___, 387 A.2d 989 (1978). The Commonwealth Court in *Payne v. Kassab,* 11 Pa. Commonwealth Court 14, 312 A.2d 86 (1973) aff'd by the Pa. Supreme Court at 468 Pa. 226, 351 A.2d 263 (1976), set forth a three-standard test to be applied in the review of an administrative decision to determine if the agency properly addressed the environmental impact of its act.

The first standard requires compliance with all applicable statutes and regulations relevant to the protection of the

[9]*Comm. of PA, DER v. Gettysburg Battlefield Tower Inc.,* 8 Pa. Commonwealth Court 231, 302 A.2d 886 (1973), aff'd Pa. , 311 A.2d 588 (1973).

Commonwealth's public natural resources. The record shows, as we have stated herein, that the DER did not comply with 25 Pa. Code §127.12, relating to plan approval requirements. There has not been any showing by appellants that any other pertinent statute or regulation has not been complied with by the DER. We note that these plan approvals have been reviewed by the Bureau of Water Quality Management and Solid Waste Management for compliance with the statutes and regulations they enforce. (The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §691.1, *et seq.* and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended,* 35 P.S. §6001, *et seq.*)

The second standard of the *Payne* test asks whether the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum. The record shows that the DER action of entering into the consent order constitutes a reasonable effort to abate the air pollution from Bradford's Bigler coal cleaning plant. DER's primary thrust in this matter, at least since the day it filed the civil penalty action, has been to cause Bradford to cease operating the coal cleaning plant in Bigler. The DER adamantly refused to agree to any resolution of this matter which did not entail Bradford's shutdown of the Bigler coal cleaning plant.[10] DER's insistance upon the relocation of the coal cleaning plant, as required by the consent order represents a reasonable effort at the abatement of the air pollution problem.

[10]Charles Allen Walker, President of Bradford Coal Co. testified that:

> "Their [DER] objective was to get us to build a new plant. They didn't particularly care where it was, so they knew the problem and I don't think they particularly cared whether we stayed in business or went out of business, either, because at one time, they gave us the alternative, 'You are either going to build a new plant, or go out of business, because we are not going to let you operate the old plant.'" Notes of testimony, pages 699, 700

DER's action in issuing the plan approvals does not demonstrate a reasonable effort to reduce the environmental incursion to a minimum because of the previously discussed failure of the DER and Bradford to comply with 25 Pa. Code §127.12(a)(5) and (6). However, if the DER and Bradford, after remand, comply with the requirements of 25 Pa. Code §127.12, it would appear that the likelihood of the residents of Bigler being affected by emissions of coal dust from the proposed plant is minimal, as §127.12 requires that Bradford must demonstrate to the DER that the emissions from the new plant will: (a) comply with all DER regulations governing emission limitations. (We note that the DER regulation governing fugitive emissions, prohibits emissions past appellants' property line); (b) not cause air pollution; (c) not prevent or adversely affect the prevention or maintenance of ambient air quality standards; and (d) be controlled through the use of best available technology.

Appellants contend that the DER violated its duty as the trustee of Pennsylvania's public natural resources because it issued the plan approvals to Bradford without determining the effect of noise from the proposed plant on the surrounding community. Appellants testified that they are disturbed, particularly at night, by unreasonably loud noise levels emanating from the present plant and, more significantly, that noise generated by a coal loading and unloading operation conducted by Bradford at the site of the proposed plant in the spring of 1978 was annoying and excessive. They assert that an awareness of these problems by DER should have prompted the DER during its review of the plan approval applications to evaluate the levels of noise which will be generated by the operation of the proposed plant and, if necessary, to place a limitation thereon. Although people must bear in their everyday lives some annoyance from noise, levels of noise which materially interfere with the ordinary comforts of life and impair the reasonable enjoyment of habitation, constitute a nuisance. *Firth vs. Scherzberg*, 366 Pa. 443, 77 A.2d 443, (1951). The Pennsylvania Supreme Court in *Township of Bedminster vs. Vargo Dragway, Inc.*, 434 Pa. 100, 253 A.2d 659, (1969), stated that, "... Every person has a right to require a degree of quietude which is consistent with the standard of comfort prevailing in the locality where he lives."

Although there is no Pennsylvania statute or regulation which expressly limits noise levels, the DER's power to abate nuisances under Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17, (by which the DER has in the past regulated noise[11]), must include the power to prevent nuisances from occurring. It would be absurd for DER to permit the construction and operation of an expensive facility that might create a nuisance—which DER could then be called upon to abate—without any consideration in the permitting process as to the likelihood of creating a nuisance.

Article I, Section 27, of the Pennsylvania Constitution requires that when the DER is made aware of an activity for which a party is seeking from the DER a permit has the potential to cause a nuisance or an environmental incursion, the DER must at least determine the likelihood of its occurrence, and if need be, take steps to require the applicant to prevent or minimize the incursion. C.f. *Concerned Citizens for Orderly Progress, et al, supra*, and, *David Beitman v. Comm. of PA, DER*, 67 D & C 499 (1974).[12]

We find that the noise from the existing plant and from the site of the proposed plant show that there is a real poten-

[11]In fact, until this past year, the Bureau of Air Quality was titled the Bureau of Air Quality and Noise Control.

[12]We believe that such a determination, using known decibel levels and distance to surrounding residences, is easily within DER's and the applicant's competence.

tial for the proposed plant to cause a nuisance from the generation of noise.[13] Therefore, in order for the DER to minimize the environmental incursion caused by its actions of issuing the plan approvals as required by Article I, Section 27, the DER must consider the noise levels from the proposed plant to determine whether its operation will interfere with the reasonable enjoyment by others of their homes.

The third *Payne* standard asks whether the environmental harm resulting from the DER's actions of entering into the consent order and issuing the plan approvals so outweigh the benefits to be derived therefrom that they constitute an abuse of discretion. The Commonwealth Court in the case of *Concerned Citizens for Orderly Progress, et al, supra,* recently resolved an ambiguity over whether this third standard of *Payne* applied to the DER by holding, unequivocally, that it does. The court stated:

> "The third standard enunciated in *Payne* requires balancing the environmental harm against the benefits to determine whether permitting the application would be an abuse of discretion. The Board, however, refused to apply this standard based upon its interpretation of *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth 335, 342 A.2d 468 (1975). The Board construed *Fox* to require that the Commonwealth refrain from balancing the benefits and harm of a project when local decisions are involved.
>
> "The Board has misunderstood the import of our decision in *Fox*. The DER's issuance of the sewage permit in *Fox* was approved since, among other reasons, 'our own review of the record, [indicates] that the benefits of the proposed sewer extension are substantial when viewed against the almost negligible direct environmental harm which will result from the sewer construction...' 20 Pa. Commonwealth at 357, 342 A.2d at 481. While it is the responsibility of local governmetal agencies to deal with planning, zoning and other related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning and consistent with statewide supervision of water quality management. Thus, the DER, as trustee of the Commonwealth's public natural resources by virtue of Article I, Section 27 of the Constitution of Pennsylvania, must address the direct impact of issuing such a permit." *Id.* 387 A.2d 989 at 993.

[13]This is not a case as in *Township of Salford, et al, supra,* where the potential for noise was mere speculation.

The DER did not undertake the inquiry necessary to perform the required balancing; however, the DER and Bradford request that this board, based on the record before it, find that the environmental impact will be minimal while the social and economic benefits will be significant, and thus, that it was not an abuse of discretion for the DER to perform the challenged actions. Although the board's primary function is to review determinations made by the DER, it may be appropriate in some circumstances, where the DER has failed to do so, for the board to balance the environmental incursion against the social and economic benefits. However, in this case, we are unab' to evaluate the environmental harm caused by the plan approvals until the DER makes some initial determinations. We need to know the affect of the proposed plant on ambient air quality and the amount of noise pollution from the plant, questions that the DER is required to answer on remand.

Since the DER has not performed the required balancing of harm and benefits and because the record before us is not sufficient to enable the board to perform the balancing, we remand the four plan approvals to the DER to balance the environmental harm from their issuance against the social and economic benefits of the proposed plant.

In regard to the DER's action of entering into the consent order, we determine that the environmental harm caused by permitting Bradford to operate the plant until July 1, 1979, during which time Bradford will be constructing a new replacement plant, does not so clearly outweigh the economic and social benefits, that the consent order constitutes an abuse of discretion. Our conclusion is based not only on the economic benefits such as employment and the production of clean coal, but on the difficulty of second guessing this settlement. The DER's object has been to cause the shutdown of the existing plant. Without a settlement, the DER would have had to pursue litigation. It is difficult to judge DER's estimate of success; whether or not it believed that it could get a final judicial determination by July 1, 1979, which would require the cessation of the plant's operation. Since we are uncertain that the DER could have caused the plant to shut down prior to July 1, 1979, and since the consent order is not prohibited by the APCA, we hold that the DER did not contravene Article I, Section 27 of the Pennsylvania Constitution when it signed the consent order.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties and the subject matter of this appeal.

2. The burden of proof in an appeal of the issuance of a plan approval by a party who is not the holder of the plan approval is on the appellant.

3. The burden of proof in an appeal by a party who objects to a consent order and agreement between the DER and a private party is on the appellant.

4. The board's review of a DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.

5. The DER has the authority to enter into a consent order and agreement which allows the operation of an air contamination source for a limited period of time while it achieves compliance.

6. The requirements of 25 Pa. Code 127.12(a)(5) that an application for a plan approval must show that the emissions from a new source will be the minimum attainable through the use of best available technology presupposes that the source will not be operated until and unless it is equipped with the best available control technology.

7. The requirement that the emissions from a new source be the minimum attainable by best available technology does not require the addition of control devices in series, *ad infinitum*.

8. The DER, before it issues a plan approval for a new source, must determine that the new source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards.

9. Article I, Section 27 of the Pennsylvania Constitution requires that the DER, as trustee of the Commonwealth's public natural resources, must address the environmental impact of its actions by balancing their social and economic benefits against their environmental harm.

10. Compliance by the DER with 25 Pa. Code §127.12 would constitute a reasonable effort to reduce environmental incursion from air pollution to a minimum as Section 127.12 requires an applicant for a plan approval to demonstrate that the emissions from a new source will comply with all the DER emission regulations, will not cause air pollution, will not prevent or adversely affect the attainment or maintenance of ambient air quality standards and will be controlled through the use of the best available control technology.

11. When the DER was made aware that noise from the proposed coal cleaning plant could be inimical to the public well-being, it was required by Article I, Section 27, to determine the likelihood of its occurrence and, if necessary, to require Bradford to prevent or minimize noise from the plant.

12. The DER did not balance the environmental harm of its actions of issuing the plan approvals for the coal cleaning plant with their social and economic benefits.

13. The DER did not balance the environmental harm of its action of entering into the consent order and agreement with its social and economic benefit; however, the board determines, based on the record before us, that the environmental harm caused by permitting Bradford to operate the Bigler coal cleaning plant until July 1, 1979, during which time Bradford will be constructing a new coal cleaning plant, does not so clearly outweigh the economic and social benefits that the consent order and agreement constitutes an abuse of discretion.

14. The DER abused its discretion when it issued Plan Approval Permit No. 17-305-00013 to Bradford without requiring Bradford to install the best available technology for controlling coal dust emissions from the roadways, the location of which are known, prior to commencement of operation of the plant.

15. Appellants have not, by the preponderance of the evidence, shown that the plan proposed by Bradford for preventing emissions from stockpiles is not equivalent to enclosing the piles in terms of fugitive dust prevention.

16. The coal/oil fired space heating boiler proposed by Bradford for the new coal cleaning plant constitutes best available technology.

ORDER

AND NOW, this 26th day of January, 1979, it is hereby ordered that:

(1) The action of the DER in entering into the October 13, 1977, Consent Order and Agreement with Bradford Coal Company is sustained and the appeals therefrom are dismissed.

(2) Plan Approval Permit Nos. 17-302-00008, 17-305-00011, 17-305-00012, and 17-305-00013 are set aside and remanded to the DER to:

(a) require Bradford Coal Company to show that the emissions from the proposed cleaning plant will not affect the attainment or maintenance of ambient air quality standards;

(b) determine whether the environmental harm which will result from the issuance to Bradford Coal Company of the plan approvals will outweigh the social and economic benefits to be derived therefrom; and

(c) insure that the noise from the proposed plant will not be inimical to the public.

(3) Plan Approval Permit No. 17-305-00013 is also remanded to the DER to:

(a) require Bradford to pave all roads the location of which are known prior to the commencement of operation of the coal cleaning plant; and

(b) determine the best available technology for prevention of emissions from the conveyor belt.

(4) Plan Approval Permit No. 17-305-00012 is also remanded to the DER to require either a bag house or a scrubber with sufficient pressure drop to equal the bag house in particulate matter removal efficiency for control of emissions from the crusting and screening station.

ENVIRONMENTAL HEARING BOARD

/s/ JOANNE R. DENWORTH
Joanne R. Denworth
Member

/s/ THOMAS M. BURKE
By: Thomas M. Burke
Member

DATED: January 26, 1979

DISSENTING OPINION

BY: Paul E. Waters, Chairman

Although I agree with much of the decision, I must nevertheless dissent.

The majority indicates that appellants "...are disturbed, particularly at night, by unreasonably loud noise levels emanating from the present plant and, more significantly, that noise generated by a coal loading and unloading operation conducted by Bradford at the site of the proposed plant in the spring of 1978 was annoying and excessive." Based on this information, the board would remand the four plan approvals to the DER for consideration of the noise levels from the *proposed* plant and its effect on the surrounding community. It seems clear to me that this approach is improper and ill-advised on both its factual and legal premises.

As a practical matter, there is no way the DER can accurately, i.e. within decibels, determine the amount of noise which will emanate from a plant which is only now under construction. The distances alone should be enough, to convince one that the DER certainly does not have the expertise to now know exactly what will be heard on this 230 acre site and beyond at some future undetermined date. As formidable as these obstacles are, I believe, in addition, that the legal underpinnings are just not there. The board cites Article I, Section 27 for the proposition that the DER has an obligation to determine the likelihood that noise from the plant will be inimical to the public well-being and to require Bradford to prevent or minimize it. As desirable and reasonable as this might be I cannot help but note that Article I, Section 27 says nothing even remotely similar. I do not believe the framers of that article or the voters intended it to broadly authorize DER to "go forth into the world and do good". If the major-

ity is concerned about a public nuisance, this law is well developed and can be appropriately employed when and if it is violated. There are other reasons why I dissent, but since the above was not sufficient to turn the board from its new path, I am sure further discussion would not do so.

/s/ PAUL E. WATERS

Paul E. Waters
Chairman

DATED: January 26, 1978

MARVIN A. FEIN
ATTORNEY AT LAW
1603 LAW AND FINANCE BUILDING
PITTSBURGH, PENNSYLVANIA 15219
(412) 281-6538

October 26, 1976

The Honorable Russell E. Train
Administrator, Environmental Protection Agency
Waterside Mall
4th and M Steets
Washington, D.C. 20460

RE: Section 304 Notice
Bradford Coal Company, Inc.
Bigler, Pennsylvania

Dear Mr. Train:

Notice is hereby given pursuant to the provisions of Sectin 304 of the Clean Air Act that sixteen families in Bigler whose names are submitted herewith by separate attachment and various other citizens of Bigler intend to file an action under the Clean Air Act in the Western District Court of Pennsylvania against Bradford Coal Company, Inc.

The company is in violation of Section 6.1 and Section 8 of the Pennsylvania Air Pollution Control Act and Sections 121.7, 123.1, 123.2 and 127.11 of the regulations promulgated under such Act on all processes at its coal preparation plant in Bigler, Pennsylvania. All of the above provisions of the Act and the regulations thereunder are a part of the Pennsylvania Implementation Plan.

Please inform me if any action is taken by your agency within the next sixty days.

Very truly yours,

/s/ MARVIN A. FEIN

Marvin A. Fein

Enclosure

cc: Alan Walker, President
C. E. Peters, Plant Engineer
The Honorable Milton J. Shapp
The Honorable Robert P. Kane
The Honorable Maurice K. Goddard
Daniel J. Snyder III

COMPLAINANTS

1. Mr. and Mrs. Robert Ellinger
2. Mr. and Mrs. Thomas Wisor
3. Mrs. Mabel Bock
4. Mr. and Mrs. Carl Leidholm
5. Mr. and Mrs. Richard Swanson
6. Mr. Delbert Marsh
7. Mr. and Mrs. Edward Welch
8. Mr. and Mrs. Lyle Miller
9. Mr. Howard C. Shaffer
10. Mr. James Lombardo
11. Mr. George Elinsky
12. Mr. Abe Wisor, Jr.
13. Mr. Wallace Dixon
14. Mr. and Mrs. Harold Lansberry
15. Mr. and Mrs. Fred Albert
16. Mr. and Mrs. Hollis Knepp

All of the above reside in Bigler or own property in Bigler which is in close proximity to the coal preparation plant.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Lavere C. and Doris J. Baughman, Ernest and Jessie Billotte, Mabel E. Bock, Violet Dixon, Robert R. and Donna Ellinger, George and Ruth Elinsky, Hollis N. and Dorothy Jean Knepp, Harold O. and Lorraine Lansberry, James and Catherine Lombardo, Delbert and Janet H. Marsh, Lyle A. and Ruth S. Miller, Howard C. and Loraine G. Shaffer, Richard Edmund and Emmabell Swanson, Edward L. and M. Joanne Welsh, Abram B. and Mabel L. Wisor, Abe B. and Leda Jane Wisor, and Thomas Irvin and Carol Shelia Wisor,

Plaintiffs

vs.

Bradford Coal Company, Incorporated

Defendant

Civil Action No. 76-1609

COMPLAINT

I. STATEMENT AS TO JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked under Section 304 of the Clean Air Act, 42 U.S.C. 1857h-2.

2. All violations of the Clean Air Act have been committed in Clearfield County, Pennsylvania and venue lies in the Western District Court of Pennsylvania.

II. PARTIES

3. The following plaintiffs all reside in and own property in Bigler, Pennsylvania in close proximity to the coal processing plant in that village owned and operated by the defendant:

a) Lavere C. and Doris J. Baughman;

b) Ernest and Jessie Billotte;

c) Mabel E. Bock;

d) Violet Dixon;

e) Robert R. and Donna Ellinger;

f) Hollis N. and Dorothy Jean Knepp;

g) Harold O. and Lorraine Lansberry;

h) James and Catherine Lombardo;

i) Delbert and Janet H. Marsh;

j) Lyle A. and Ruth S. Miller;

k) Howard C. and Loraine G. Shaffer;

l) Richard Edmund and Emmabell Swanson;

m) Edward L. and M. Joanne Welsh;

n) Abram B. and Mabel L. Wisor;

o) Abe B. and Leda Jane Wisor;

p) Thomas Irvin and Carol Shelia Wisor.

The plaintiffs George and Ruth Elinsky own and operate a mobile home court in close proximity to defendant's coal processing plant in Bigler, Pennsylvania.

4. The defendant is Bradford Coal Company, Incorporated, a Pennsylvania corporation, which owns and operates a large coal processing and preparation plant in the village of Bigler, Pennsylvania. Such plant includes, *inter alia*, vast coal storage areas, coal cleaning plants, coal conveying processes, coal loading areas and coal cleaning, loading and storage equipment. The emissions of coal dust from all such processes, facilities and equipment have been in violation of the Pennsylvania Implementation Plan adopted under the Clean Air Act since its adoption in 1972 and have created a nuisance and caused substantial damage to the plaintiffs and their property since at least 1961.

III. CONDITIONS PRECEDENT

5. Pursuant to Section 110 of the Clean Air Act, 42 U.S.C. 1857c-5, the Commonwealth of Pennsylvania adopted an Implementation Plan for the control of air contaminants and such plan was duly approved by the United States Environmental Protection Agency in 1972. All emissions limitations and permit requirements contained therein may be enforced in this Court by the plaintiffs pursuant to the provisions of Section 304 of the Clean Air Act, 42 U.S.C. 1857h-2.

6. By letter dated October 26, 1976, the plaintiffs complied with the notice requirements of 42 U.S.C. 1857h-2(b).

IV. FACTUAL ALLEGATIONS

7. Defendant in the operation of its coal preparation and processing plant in Bigler, Pennsylvania causes voluminous amounts of fugitive coal dust emissions to escape from off of its property, processes, facilities and equipment.

8. Such coal dust emissions have caused and continue to cause damage to the plaintiffs' property, loss of use and

enjoyment of the plaintiffs' property, additional expense to the plaintiffs for the maintenance of their property, additional medical expenses to the plaintiffs, deterioration in the health of the plaintiffs and their families and a deterioration in the value of their property.

9. All emissions of coal dust from defendant's plant are from sources for which defendant has never applied for or received a permit from the Pennsylvania Department of Environmental Resources as required by Section 6.1 of the Pennsylvania Air Pollution Control Act and Section 127.11 of the regulations thereunder. Such provisions are a part of the duly approved Pennsylvania Implementation Plan and enforceable under the Clean Air Act.

10. All emissions of coal dust from defendant's plant are in violation of the emissions limitations in Sections 123.1 and 123.2 of the regulations promulgated under the Pennsylvania Air Pollution Control Act, duly approved as part of the Pennsylvania Implementation Plan and enforceable under the Clean Air Act.

11. All emissions of coal dust from the defendant's plant are in violation of the emissions limitations in Sections 3(5) and 8 of the Pennsylvania Air Pollution Control Act, 35 P.S. 4003(5) and 4008 and Section 121.7 of the regulations thereunder. Such provisions are a part of the duly approved Pennsylvania Implementation Plan and enforceable under the Clean Air Act.

12. All of the plaintiffs' damages are a direct result of the defendant's failure to comply with the emissions limitations and permit requirements in the Pennsylvania Implementation Plan.

13. Defendant's continuing violation of the Pennsylvania Implementation Plan has been and continues to be willful, intentional and malicious.

V. CAUSES OF ACTION

14. Defendant is in violation of the permit requirements of Section 67.1 of the Pennsylvania Air Pollution Control Act and Section 127.11 of the regulations thereunder all of which provisions are a part of the duly approved Pennsylvania Implementation Plan.

15. Defendant is in violation of the emissions limitations of Sections 3(5) and 8 of the Pennsylvania Air Pollution Control Act, 35 P.S. 4003(5) and 4008, and Sections 121.7, 123.1 and 123.2 of the regulations thereunder, all of which provisions are a part of the duly approved Pennsylvania Implementation Plan.

16. Defendant has created a nuisance and caused extensive damage to the plaintiffs and their property as a result of the continuous violations of the Pennsylvania Implementation Plan.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court enter an Order:

A. Enjoining the defendant from operating or maintaining any sources of coal dust emissions at its coal preparation and processing plant in Bigler, Pennsylvania unless and until it receives a permit to operate and maintain such sources from the Pennsylvania Department of Environmental Resources;

B. Enjoining the defendant from operating or maintaining any sources of coal dust emissions at its coal preparation and processing plant in Bigler, Pennsylvania unless such source is operated or maintained in compliance with the applicable emissions limitations;

C. Awarding each plaintiff damages in excess of $10,000.00 as compensatory and punitive damages; and

D. Awarding plaintiffs their full costs of litigation, reasonable attorneys fees and witness fees.

/s/ MARVIN A. FEIN

Marvin A. Fein
1603 Law and Finance Building
Pittsburgh, Pennsylvania 15219
(412) 281-6538
Attorney for the plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Lavere C. and Doris J. Baughman, et al.,
Plaintiffs

vs.

Bradford Coal Company, Incorporated,
Defendant

Civil Action No. 76-1609

MOTION TO ADD PARTY PLAINTIFFS

The plaintiffs by their attorney hereby move that Carl and Jeannette Leidholm be added as party plaintiffs in the above captioned matter for the following reasons:

1. Carl and Jeannette Leidholm, like the other plaintiffs, reside in and own property in Bigler, Pennsylvania in close proximity to the coal processing plant in that village owned and operated by the defendant.

2. The required 60 days notice of suit was given on behalf of Carl and Jeannette Leidholm as well as the other plaintiffs pursuant to Section 307 of the Clean Air Act, 42 U.S.C. 1857h-2.

3. All factual allegations, causes of action and prayers for relief in the Complaint will be adopted by Carl and Jeannette Leidholm and no additional pleading will need to be filed if they are added to party plaintiffs.

4. The defendant cannot be prejudiced by adding these additional parties since they have not answered the Complaint and will not be required to do so until February 9, 1977.

5. The only reason that the Leidholms were not included on the Complaint filed in this matter is that counsel for plaintiffs did not receive authorization from them to file a suit on their behalf until after the Complaint was filed.

WHEREFORE, it is respectfully requested that Carl and Jeannette Leidholm be included as party plaintiffs in this matter.

/s/ MARVIN A. FEIN

Marvin A. Fein
1603 Law and Finance Building
Pittsburgh, Pennsylvania 15219
(412) 281-6538
Attorney for the plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Lavere C. and Doris J. Baughman, et al.,
Plaintiffs
vs.
Bradford Coal Company, Incorporated,
Defendant

Civil Action No. 76-1609

ORDER OF COURT

AND NOW, this 28th day of January, 1977, upon consideration of Plaintiffs' Motion To Add Party Plaintiffs, it is hereby Ordered that:

Carl and Jeannette Leidholm shall be added as party plaintiffs to this matter and all allegations of the Complaint shall be applicable to them as well as all other plaintiffs.

BY THE COURT:

/s/ MARSH, J.
J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al.,
Plaintiffs,
v.
BRADFORD COAL COMPANY, INCORPORATED,
Defendant.

Civil Action No. 76-1609

MOTION TO DISMISS

Defendant, BRADFORD COAL COMPANY, INC., by and through its attorneys and in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, moves this Court to dismiss the within complaint and action:

1. The complaint fails to state a claim upon which relief can be granted in that a private cause of action to recover damages for alleged violations of the Pennsylvania Implementation Plan is not conferred by §304 of the Clean Air Act, 42 U.S.C.A. §1857h-2, the only asserted basis of federal jurisdiction.

2. The complaint fails to state a claim upon which relief can be granted in that plaintiffs lack standing or the capacity to commence this action since the Commonwealth of Pennsylvania has commenced, within the meaning of §304(b)(1)(B) of the Clean Air Act, and is diligently prosecuting against Defendant, a civil enforcement action before the Pennsylvania Environmental Hearing Board at Docket No. 76-096-CP-W to require Defendant to comply with the Pennsylvania Implementation Plan at its coal processing facility in Bigler, Pennsylvania.

3. The complaint fails to state a claim upon which relief can be granted as to the following named Plaintiffs who have not given individual notice as required by §304(b)(1)(A) of the Clean Air Act and hence lack standing or the capacity to commence the within action: Lavere C. and Doris J. Baughman, Ernest and Jessie Billotte, Violet Dixon, Ruth Elinsky, Catherine Lombardo, Janet H. Marsh, Loraine G. Shaffer, Abram B. and Mabel L. Wisor, and Leda Jane Wisor.

4. The Court lacks jurisdiction over the subject matter of the complaint in that the Commonwealth of Pennsylvania has commenced, within the meaning of §304(b)(1)(B) of the Clean Air Act, and is diligently prosecuting against Defendant, a civil enforcement action before the Pennsylvania Environmental Hearing Board at Docket No. 76-096-CP-W to require Defendant to comply with the Pennsylvania Implementation Plan at its coal processing facility in Bigler, Pennsylvania.

5. The Court lacks jurisdiction over the subject matter of the complaint as it relates to plaintiffs' claim for damages under §304 of the Clean Air Act.

6. The Court lacks jurisdiction over the subject matter of the complaint as to the persons identified in Paragraph 3 above for failure of such persons to give individual notice as required by §304(b)(1)(A) of the Clean Air Act.

WHEREFORE, Defendant requests this Court to enter an Order dismissing the within complaint and action with prejudice.

NEVLING, DAVIS,
KRINER & YEAGER
By /s/ James K. Nevling
James K. Nevling
110 N. Second Street
P. O. Box 752
Clearfield, PA 16830
Telephone: [814] 765-9611
Attorneys for Defendant,
Bradford Coal Company,
Incorporated.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al.,
Plaintiffs,
v.
BRADFORD COAL COMPANY, INCORPORATED,
Defendant.

Civil Action No. 76-1609

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CLEARFIELD } ss:

C. Alan Walker, being duly sworn, deposes and says that he is President of BRADFORD COAL COMPANY, INCORPORATED, Defendant in the above-captioned case; that he is authorized to execute this Affidavit on its behalf; and that upon personal knowledge, information and belief the individuals identified in Paragraph 3 of the foregoing Motion to Dismiss have not given any notice to Defendant in accordance with §304 of the Clean Air Act.

/s/ C. ALAN WALKER

SWORN to and subscribed before me this 23rd day of February, 1977.

/s/ MARY M. WAGNER
Notary Public

My Commission Expires:

MARY M. WAGNER, Notary Public
Bigler, Clearfield Co., Pa.
My Commission Expires June 28, 1979

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al.,
Plaintiffs,

vs.

BRADFORD COAL COMPANY, INCORPORATED,
Defendant.

Civil Action No. 76-1609

ANSWER

Defendant, Bradford Coal Company, Incorporated (herein "Bradford"), by its attorneys David S. Watson, Peter G. Veeder and Thorp, Reed & Armstrong, answers the Complaint as follows:

1. Admits that the jurisdiction of the Court is invoked under §304 of the Clean Air Act, but denies that the Court has jurisdiction of the subject matter of Plaintiffs' Complaint.

2. Admits that venue in the Western District of Pennsylvania is proper, but denies that Bradford has committed any violation of the Clean Air Act.

3. Bradford is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 3 of the Complaint.

4. Admits that Bradford is a Pennsylvania corporation and that it owns and operates a coal processing and cleaning plant in Bigler, Pennsylvania, denies that its facilities are vast and denies that emissions of coal dust from its processes have been in violation of the Pennsylvania Implementation Plan adopted under the Clean Air Act, or have created a nuisance, or have caused any damage to Plaintiffs or their property.

5. Admits the averment of the first sentence of paragraph 5 of the Complaint, but denies that Plaintiffs may enforce any emission limitations or permit requirements contained in the Pennsylvania Implementation Plan against Bradford in this Court pursuant to §304 of the Clean Air Act, 42 U.S.C. §1857h-2.

6. - 8. Denies the averments of paragraphs 6, 7 and 8 of the Complaint.

9. Denies that Bradford is required by §6.1 of the Pennsylvania Air Pollution Control Act and by §125.11 of the Pennsylvania Coal Refuse Disposal Area Rules to obtain a permit for its Bigler operation, and by way of further answer avers that those operations have, at all times since May 14, 1971, been governed by and in accordance with the terms of the Consent Decree entered by the Court of Common Pleas of Clearfield County, Pennsylvania in *Commonwealth of Pennsylvania v. Bradford Coal Co., Inc.*, No. 3 October term 1970, whereby the Court of Common Pleas of Clearfield County has retained jurisdiction for the purpose of assuring compliance by Bradford with the terms of that Decree and for the entry of such further orders and directions as may be necessary for the construction or implementation of such Decree.

10. - 16. Denies the averments of paragraphs 10, 11, 12, 13, 14, 15 and 16 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

17. The Court lacks the jurisdiction of the subject matter of the claim asserted by Plaintiffs under the Clean Air Act.

SECOND AFFIRMATIVE DEFENSE

18. The Court lacks jurisdiction of the subject matter of the claims asserted by Plaintiffs under the Pennsylvania Air Pollution Control Act and the common law.

THIRD AFFIRMATIVE DEFENSE

19. Plaintiffs' claim for injunctive relief and for damages to their person and property are barred by Laches.

FOURTH AFFIRMATIVE DEFENSE

20. Some or all of the claims asserted by Plaintiffs are barred by the applicable Statutes of Limitations.

FIFTH AFFIRMATIVE DEFENSE

21. When Plaintiffs, or some of them, became owners or occupiers of premises in close proximity to Bradford's facilities, they knew or should have known of the conduct by Bradford of its business at those facilities, and they are now therefore estopped or otherwise precluded from seeking relief on the basis of Bradford's conduct of its business.

SIXTH AFFIRMATIVE DEFENSE

22. When Plaintiffs, or some of them, became owners or occupiers of premises in close proximity to Bradford's facilities, they knew or should have known of the conduct by Bradford of its business at those facilities, and they have therefore assumed the risk of any injury or damage related to Bradford's conduct of its business.

SEVENTH AFFIRMATIVE DEFENSE

23. If the activities complained of have continued for the period of time alleged, Bradford has acquired a prescriptive right to continue such activities without any liability to Plaintiffs.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a claim on which relief can be granted.

WHEREFORE, Defendant Bradford requests that Judgment be entered for it, that the action be dismissed with prejudice, and that it be awarded its costs, reasonable attorneys' fees and such other relief as may be fitting and proper.

Respectfully submitted,

Of counsel:

Nevling, Davis, Kriner
& Yeager
110 North Second Street
P. O. Box 752
Clearfield, PA 16830

/s/ DAVID S. WATSON
David S. Watson

/s/ PETER G. VEEDER
Peter G. Veeder

/s/ THORP, REED & ARMSTRONG
Thorp, Reed & Armstrong

Attorneys for Bradford Coal Co., Incorporated

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAVERE C. and DORIS J. BAUGHMAN, et al.,
Plaintiffs

vs.

BRADFORD COAL COMPANY, INC.,
Defendant

Civil Action No. 76-1609

SUGGESTION OF LACK OF JURISDICTION OF THE SUBJECT MATTER

Pursuant to Rule 12(h) (3) of the Federal Rules of Civil Procedure, Defendant Bradford Coal Company, Inc., by its counsel David S. Watson, Richard M. Zomnir and Thorp, Reed & Armstrong, respectfully suggests that the Court lacks jurisdiction of the subject matter of this action and in support thereof states as follows:

1. Plaintiffs seek to enjoin Defendant from operatings its coal processing plant in Bigler, Pennsylvania, until Defendant receives a permit from the Pennsylvania Department of Environmental Resources, and unless such operations are brought into compliance with the applicable emissions limitations established by the Pennsylvania Air Pollution Control Act and the Regulations promulgated thereunder. Federal jurisdiction of this action is based upon the Citizens' Suit provisions of Section 304 of the Clean Air Act, as amended, 42 U.S.C. Section 7604. Plaintiffs have also alleged pendent common law claims for compensatory and punative damages.

2. With respect to Citizens' Suits, Section 7604(b) (1)(B) provides that no action may be commenced in the District Court:

> "if the Administrator or State has commenced and is diligently prosecuting a civil action in a Court of the United States or a State to require compliance with the standards, limitations, or order, ... "

3. As a result of the proceedings commenced by the Commonwealth against Defendant before the Environmental Hearing Board at Docket Number 76-096-CP-W, and after public hearing, the Commonwealth and Defendant have entered into a Consent Order and Agreement dated October 13, 1977, (a true and correct copy of which is attached hereto as Exhibit "A") which makes full provision for the compliance by Defendant's coal processing operations in Bigler with those provisions and limitations of the Pennsylvania Air Pollution Control Act and Regulations, which Plaintiffs here seek to enforce under the Clean Air Act as part of the Pennsylvania Implementation Plan. Notice of the Consent Order and Agreement was published in the Pennsylvania Bulletin on October 29, 1977, and a copy of such Notice is attached hereto as Exhibit "B".

4. As it relates to the relief sought by Plaintiffs in this Citizens' Suit, the Consent Order and Agreement does the following:

a. Permits Defendant to operate its existing facility until July 1, 1979.

b. Permits the relocation and construction of a completely new, modern coal cleaning facility by December 31, 1979.

c. Establishes reasonable interim measures which Defendant must implement in order to prevent fugitive emissions during the remaining operations at its existing facility.

d. Reserves to the Department of Environmental Resources the right to enforce the Air Pollution Act and the Regulations promulgated thereunder if Defendant fails to comply with any provision or requirement of the Consent Order and Agreement.

e. Secures Defendant's performance of its obligations to terminate operations at the existing facility by July 1, 1979, and to complete construction of the new facility by December 31, 1979, by two $50,000 bonds which Defendant has posted.

5. In light of the Consent Order and Agreement resulting from the action filed by the Commonwealth's Department of Environmental Resources against Defendant, such action clearly is one to require Defendant to comply with the provisions and limitations of the Pennsylvania Implementation Plan, and Section 7604(b)(1)(B) of the Clean Air Act precludes this Citizens' Suit to enforce the same provisions and limitations.

6. The dismissal of this action for lack of subject matter jurisdiction should be without prejudice to the right of any Plaintiff to pursue a common law claim for damages in an appropriate State Court.

Respectfully submitted,

/s/ DAVID S. WATSON
David S. Watson

/s/ RICHARD M. ZOMNIR/dw
Richard M. Zomnir

THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, PA 15219
(412) 288-7711

Attorneys for Defendant, Bradford Coal Company, Inc.

OF COUNSEL:

William C. Kriner, Esq.
NEVLING, DAVIS, KRINER & YEAGER
110 North Second Street
Clearfield, Pa. 16830

November 10, 1977

§7604. [CAA§304]

Citizen suits—Establishment of Right to bring suit

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violaltion of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modifed major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Notice

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or state has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; intervention by Adminstrator

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Award of cost; security

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any state or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

Definition

(f) For the purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard.

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter 1 of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise).

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

July 14, 1955, c. 360, Title III, §304, as added Dec. 31, 1970, Pub.L. 91-604, §12(a), 84 Stat. 1706, and amended Aug. 7, 1977, Pub.L. 95-95, §303(a)-(c), 91 Stat. 771; Nov. 16, 1977, Pub.L. 95-190, §14(a)(77)-(78), 91 Stat. 1404.

730

III. NOTICE

Section 304(a) (3) would require 30-days notice to the Secretary, his authorized representative and the authorized representative of the appropriate state pollution control agency by prospective plaintiffs prior to the initiation of certain civil actions. The notice provision contains several shortcomings.

Thirty days is an inordinately abbreviated period of time within which the Secretary or state agency can reasonably be expected to review the allegations, conduct an investigation and initiate action, if any is appropriate. By contrast, S. 3201 as approved by the Senate Commerce Committee would accord the enforcement agencies up to 180 days after notice to take action in the relatively less complicated area of unfair consumer practices. A 30-day notice provision would lead either to a proliferation of citizens' suits or a larger number of ill-considered protective suits by the agencies in the technologically complex air pollution field.

No notice or waiting period whatever would apply to private actions under §§113(g) (1) (A) or (B), 114(e)(1) or 115 or actions to abate violations of the Secretary's orders issued under §117. The Secretary and enforcement agencies would thereby be deprived of the first opportunity to enforce these provisions in a manner consistent with the total program of administration.

No provision is made, moreover, for the form and content of such notice. Undoubtedly, among legitimate complaints are innumerable crank letters which are and would be received by the state agencies. Would the mere fact that some might be sent by registered mail or hand delivered satisfy the notice requirements of §304? If so, such notice might not even come to the attention of the appropriate authority which would initiate effective enforcement action. Yet no provision is made in the proposals for the notice to

identify prospective defendants, to identify the practices involved in the alleged violation or alleged nonfeasance of the Secretary, to cite the section or sections of the Act under which plaintiffs intend to proceed, to describe the relief to be sought, or to designate the forum in which the civil action might be initiated.

Finally, no provision is made for notice to be given private persons or corporations which might be subject to suit. Absence of such notice could preclude prelitigation settlements which would avoid undue burdens on both the courts and the Secretary.

IV. Multiple Suits Including the Government

The draft legislation fails to prescribe the effect on private complaints of the initiation of a government enforcement action either within or beyond the thirty-day notice period, if applicable. No standards are provided in the case of a government action initiated with regard to those sections of the Act as to which the notice requirements do not apply. Finally, the proposal does not deal with the situation where a government enforcement action is pending at the time notice is given.

The legislative plan necessarily contemplates virtually exclusive administration and enforcement of the Act through a federal-state cooperative program. Proposed section 304 is at cross-purposes with this plan.

The Secretary and the state enforcement agencies are the appropriate representatives of the national interest and of the interests of private persons under the Act. It is for these government agencies to select the best tools available for enforcement of the Act without ill-considered interference through private litigation.

Intolerable situations could arise even in the relationship between private suits and actions by the federal government. Assume that the federal government, having become

aware of a violation of a performance standard under §113, initiates a proceeding under §117(a) (2) which will culminate in an administrative preventive order. The alleged violator is not contesting the entry of an order. Dissatisfied private persons might nevertheless initiate a court action for abatement, without notice; as would be authorized under the legislation. Two proceedings under the same provision, one judicial and one administrative, would be running a parallel course to the confusion of the air quality control program, the needless congestion of the courts and the unnecessary inconvenience of the parties.

Similarly, assume that subsequent to initiation of a private civil action under §115, the federal government files an abatement action under §115(c). Dissatisfied with the appropriateness of the relief requested in the government suit, the private parties continue to pursue their litigation.[7] Nothing in the bill would prevent them from doing so. The legislation does not even make provision for a stay of the private action or actions and their consolidation with government litigation. And, perforce, no provision is made for control of such litigation by the Secretary if such consolidation were to be effected.

Innumerable other illustrations of the potentially adverse effect of §304 on the coherent administration of the program could be developed by considering the various sections of the Act under which private suits could be brought and the various relationships between the notice provision and time at which government action is initiated.

The problem becomes more complex when its impact on state enforcement programs is considered. Assume that within the thirty-day notice period a state files proceedings

[7]Such circumstances are not unusual at the present time. See, *Campbell Soup Co.*, FTC Dkt. No. C-1741, CCH Trade Reg. Rep., 1967-1970 trf. binder ¶12,261 (FTC, May 25, 1970).

under state law to abate the violation of an emission requirement contained in the state's approved implementation plan. Nothing in §304 or elsewhere in the bill would prevent private plaintiffs from persisting in filing their federal action to accomplish essentially the same result. Moreover, there is no ready vehicle which would bring about a consolidation of the state action with the federal action. Again the courts and the administration of the Act would be confronted by unwarranted parallel actions.

If there is any justification for citizens' suits it is in those circumstances involving complete government inaction. The government is the proper source for the selection of enforcement tools, and its discretion in this regard should not be disrupted by private litigation. Where the government, federal or state, initiates enforcement procedures prior to, within or beyond a reasonable notice period, there is no rational justification for private suits.

V. Multiple Suits Not Including the Government

Proposed section 304 does not in any way provide for the consolidation and management of private actions which might be filed containing an overlap of law, facts and remedies. Since interstate standards and standards of interstate scope are to an extent contemplated under the legislation, it can be anticipated that parallel citizens' suits would be filed in several judicial districts.

Multiple suits may be transferred by the Judicial Panel on Multidistrict Litigation to a single transferee court pursuant to 28 U.S.C. §1407, but only for purposes of pre-trial proceedings such as discovery. The statute provides for remand to the initiating district upon completion of such procedures.

Accordingly, the prospect arises that a number of district courts will be faced with determining the merits as to a number of overlapping claims and diverse results and remedies may be anticipated.

By the same token, no provision is made to prevent conflict between overlapping private national actions and private state actions which would be preserved under §304(a)(2). It would seem appropriate that national citizen actions sufficient to invoke federal court jurisdiction should not be simultaneously tried in the state courts. The state courts are, however, appropriate repositories for those actions seeking remedies for alleged wrongs under state law whose impact is largely intrastate.

353

ARGUMENTS ON CITIZEN SUITS [Sec. 304]

1. The citizen suit provision is new to members of the Senate and has not had adequate hearing.

A similar provision was included in S. 3546 as introduced, and substantial testimony from citizens' groups supported it as a key provision in this year's air pollution legislation.

2. This provision would encourage frivolous or harassing suits against industries and government agencies.

The bill provides no action for damages, only for the abatement of violation of standards, which are public policy. Expressly for the purpose of limiting harassing or frivolous suits, the bill provides that the court may award the costs of litigation, including reasonable attorney and expert witness fees, to either party as the public interest requires. The court would surely award costs to the defendant, a potentially expensive risk for the plaintiff, where the litigation was obviously harassing or frivolous.

3. A citizen suit provision is based on the assumption that Federal and State agencies will be incompetent, corrupt or otherwise not discharge their responsibilities.

Citizens in bringing such actions are performing a public service. The limited resources of many State enforcement agencies, bearing the first line of responsibility under this bill, will be fully extended. This provision, requiring 30 days notice to State and Federal agencies, in which they may initiate abatement proceedings, will allow many violations to come to their attention which might otherwise escape notice. The only exceptions to this 30 day period for administrative action come for hazardous emissions or those of which the Secretary can be assumed to already have noticed.

4. Authorizing citizens actions against polluters and government agencies would burden already clogged courts.

A great number of these actions would come to the courts anyway, even if vigorously pursued by administrative agencies. Enforcement of an order to abate must be obtained in the courts, whether an agency or a private citizen initiates action. But more importantly, should the granting and protection of a right to clean air rooted in public policy be limited to what the courts can comfortably handle? We must legislate to protect the public health, then strengthen our court system as appears necessary.

5. The courts do not have the competence to handle the issues in air pollution control actions, and sending such actions there rather than confining them to expert administrative agencies, delays and confuses enforcement.

Enforcement of air pollution standards and regulations is not a technical matter beyond the competence of courts. This provision merely asks the court to do what it does best: a fact finding job as to violations of a definite numerical standard. If a violation is found, a judicial remedy is fashioned as indicated above, citizen enforcement would not disrupt administrative enforcement, but would reinforce and extend it. Standards would be the same under either mode.

MR. MUSKIE. Mr. President, we are talking, gentlemen, about apples and pears. What we are talking about here is a judicial way for citizens to enforce the provisions of this act.

May I make another point about it, that before any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind. In other words, the idea is to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not

respond, then the citizen has his right to go to court. That is a much more limited application of the concept of citizen access to the courts than anything that has been discussed by the Senator from Nebraska (Mr. Hruska) or the Senator from Kentucky (Mr. Cook).

MR. COOK. Mr. President, I merely brought this up in regard to the remarks of the Senator from Michigan (Mr. Griffin), because I felt that it would be a good opportunity to do so. I am sorry that that opportunity has passed. I felt it was a good opportunity when I first...

355

I merely say that S. 3201 is the same. It allows anyone to bring suit in Federal court on the basis of $10 or more. But we are writing new authority and a new cause of action in the Federal court and not placing a jurisdictional amount on it.

I might say that I have no objection except that I think in the future we will eliminate all jurisdictional amounts in Federal court and we had better be ready to appoint a whale of a lot more Federal judges.

Mr. MUSKIE. Mr. President, I read from page 83, lines 24 and 25 of the bill. [Sec. 304(a)(1)] It states that such actions "may be brought by one or more persons on their own behalf."

Mr. HART. Mr. President, I would like to address myself at this time to section 304 of S. 4358, the citizen suit provision of the bill. I regard this provision as one of the most attractive features of the bill and am therefore disturbed by criticism of it which has been offered both within and without this Chamber.

The basic argument for the provision is plain: namely, that Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur. In testifying on a similar bill before the Senate Subcommittee on Energy, Natural Resources and the Environment, former Attorney General Ramsey Clark spoke convincingly of this inevitable incapability. Mr. Clark stated:

It will be impossible for government enforcement to control all significant acts of pollution ... The extension of private right ... and effective sanctions for the persons directly affected or concerned will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination, such as in schooling, employ-

ment, and housing tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.

Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollutions in his life, the power to stop them through legal process.

Far from risking an undue or inhibiting interference with Government, it will provide powerful supplementary enforcement . . . and an effective and desirable prod to officials to do their duty.

It has been argued, however, that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S. 4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill. For the most part, only in the case where there is a crying need for action will action in fact be likely. In such cases, I would argue that action must be in the public interest.

The bill also provides for a notice requirement to State and Federal pollution agencies prior to the bringing of suit. [Sec. 304(a)(3)] This requirement, it is expected, will have the effect of prodding these agencies to act. In many cases, it is hoped, they will be able to act without resorting to the courts.

280

Mr. President, I think it is important to note the limitations written into this provision of the bill by the committee that are noted in the section of the committee report which I have just inserted in the record.

First of all, the section does not presume that there will be a lack of good will or good faith or dedication on the part of those administering the provisions of the law in doing so.

What we are seeking to establish is a nationwide policy. National ambient air standards implemented by plans developed at the State and local level create potentially enormous enforcement problems for State, local, and regional governments, as well as for the National Government. I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations of the requirements contained in all the implementation plans that will be filed under this act, all the other requirements of the act, and the responses of the enforcement officers to their duties.

Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike. So we have provided this restrictive citizen suit provision for that purpose. We took testimony on this subject. It was strongly supported by legal scholars and several organizations. The provision, as finally written into the bill, is considerably cut down from some of the proposals that were advanced. It is not a class-action provision.

These features might be of interest:

First of all, a citizen suit can be brought only to enforce the provisions of the act or the requirements that are established as a result of the operations of the act. In other words,

a citizen suit is limited to the right to seek the enforcement of the provisions of the act.

Second, before bringing suit, there is a requirement in this provision that the citizen bring his intention to bring suit to the attention of the local enforcement agency, the thought being that he might trigger administrative action to get the relief he might otherwise seek in the courts.

I think most citizens, if they were able to trigger such administrative action, would be satisfied with having done so. Thus, they would have done nothing more than the act anticipates—that is, the full and effective enforcement of the provisions of the law.

In those instances where enforcement was not triggered, that is, enforcement action by the administrative agency was not triggered, then it seemed to us the citizen ought to be able to pursue the judicial remedy.

The Senator from Nebraska raised the question of possible harassing suits by citizens. This the committee attempted to discourage by providing that the costs of litigation—including counsel fees—may be awarded by the courts to the defendants in such cases, so that the citizen who brings a harassing suit is subject not only to the loss of his own costs of litigation, but to the burden of bearing the costs of the parties against whom he has brought the suit in the first instance.

I doubt very much that individual citizens would lightly engage this possibility.

These are some of the points it seemed to me ought to be brought to the attention of the Senate, in the light of the remarks made by ....

PENNSYLVANIA AIR POLLUTION CONTROL ACT

(Air Pollution Control Act, P.L. 2119, Approved January 8, 1960; Amended by Laws of 1972, Act 245, Approved and Effective October 26, 1972; House Bill 2406, Session of 1976, December 2, 1976)

Administering Agency:
Department of Environmental Resources
Harrisburg, Pa. 17120

Section 1. An act to provide for the better protection of the health, general welfare and property of the people of the Commonwealth by the control, abatement, reduction and prevention of the pollution of the air by smokes, dusts, fumes, gases, odors, mists, vapors, pollens and similar matter, or any combination thereof; imposing certain powers and duties on the Department of Environmental Resources, the Environmental Quality Board and the Environmental Hearing Board; establishing procedures for the protection of health and public safety during emergency conditions; creating a stationary air contamination source permit system; providing additional remedies for abating air pollution; reserving powers to local political subdivisions, and defining the relationship between this act and the ordinances, resolutions and regulations of counties, cities, boroughs, towns and townships; imposing penalties for violation of this act; and providing for the power to enjoin violations of this act; and conferring upon persons aggrieved certain rights and remedies.

Section 2. Declaration of Policy. — It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the

recreational resources of the Commonwealth; and (iv) development, attraction and expansion of industry, commerce and agriculture.

Section 3. Definitions. — The following words and phrases, when used in this act, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this section:

(1) "Department." Department of Environmental Resources of the Commonwealth of Pennsylvania.

(2) "Board." The Environmental Quality Board established in the department by the act of December 3, 1970 (Act No. 275).

(2.1) "Hearing board." The Environmental Hearing Board established in the department by the act of December 3, 1970 (Act No. 275).

(3) "Person." Any individual, public or private corporation for profit or not for profit, association, partnership, firm, trust, estate, department, board, bureau or agency of the Commonwealth, political subdivision, municipality, district, authority or any other legal entity whatsoever which is recognized by law as the subject of rights and duties.

(4) "Air contaminant." Smoke, dust, fume, gas, odor, mist, vapor, pollen, or any combination thereof.

(5) "Air pollution." The presence in the outdoor atmosphere of any form of contaminant in such place, manner, or concentration inimical or which may be inimical to the public health, safety, or welfare or which is, or may be injurious to human, plant or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life or property.

(6) "Air contamination." The presence in the outdoor atmosphere of an air contaminant which contributes to any condition of air pollution.

(7) "Air contamination source." Any place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant.

(8) "Stationary air contamination source." Any air contamination source other than that which, when operated, moves in a given direction under its own power.

(9) "Region." Any geographical subdivision of the Commonwealth whose boundaries shall be determined by the board.

(10) "Approved air pollution control agency." An air pollution control agency of any political subdivision of the Commonwealth which has been granted approval by the board.

Section 4. Powers and Duties of the Department of Environmental Resources. — The department shall have power and its duty shall be to —

(1) Enter any building, property, premises or place and inspect any air contamination source for the purpose of investigating an actual or a suspected source of air pollution or for the purpose of ascertaining the compliance or noncompliance with any rule or regulation which may have been adopted and promulgated by the board hereunder. In connection with such inspection or investigation, samples of air, air contaminants, fuel, process material or other matter may be taken for analysis.

(2) Have access to, and require the production of, books and papers pertinent to any matter under investigation.

(2.1) Require the owner or operator of any air contamination source to establish and maintain such records and make such reports and furnish such information as the department may reasonably prescribe.

(2.2) Require the owner or operator of any air contamination source to install, use and maintain such air contaminant monitoring equipment or methods as the department may reasonably prescribe.

(2.3) Require the owner or operator of any air contamination source to sample the emissions thereof in accordance with such methods and procedures and at such locations and intervals of time as the department may reasonably prescribe and to provide the department with the results thereof.

Enter upon any property on which an air contamination source may be located and make such tests upon the source as are necessary to determine whether the air contaminants being emitted from such air contamination source are being emitted at a rate in excess of a rate provided for by board rule or regulation or otherwise causing air pollution. Whenever the department determines that a source test is necessary, it shall give reasonable written notice to the person owning, operating, or otherwise in control of such source, that it will conduct a test on such source. Thereafter, the person to whom such notice is given shall provide such reasonably safe access to the testing area, and such sampling holes, facilities, electrical power and water as the department shall specify in its notice.

(4) Receive, initiate and investigate complaints, institute and conduct surveys and testing programs, conduct general atmospheric sampling programs, make observations of conditions which may or do cause air pollution, make tests or other determinations at air contamination sources, and assess the degree of abatement required.

(4.1) Issue orders to any person owning or operating an air contamination source, or owning or possessing land on which such source is located, if such source is introducing or is likely to introduce air contaminants into the outdoor atmosphere in excess of any board rule or regulation, or any

permit requirement applicable to such source, or at such a level so as to cause air pollution. Any such order may require the cessation of any operation or activity which is introducing air contaminants into the outdoor atmosphere so as to cause air pollution, the reduction of emissions from such air contamination source, modification or repair of such source or air pollution control device or equipment or certain operating and maintenance procedures with respect to such source or air pollution control device or equipment, instruction of a process change, installation of air pollution control devices or equipment, or any or all of said requirements as the department deems necessary. Such orders may specify a time for compliance, require submission of a proposed plan for compliance, and require submission of periodic reports concerning compliance. If a time for compliance is given, the department may, in its discretion, require the posting of a bond in the amount of twice the money to be expended in reaching compliance.

All department orders shall be in writing, contain therein a statement of the reasons for their issuance, and be served either personally or by certified mail. Other person aggrieved by such order may file with the hearing board an appeal setting forth with particularity the grounds relied upon. An appeal to the hearing board of the department's order shall not act as a supersedeas: provided, however, that upon application and for cause shown, the hearing board of the Commonwealth Court may issue such a supersedeas. Any person aggrieved by an adjudication of the hearing board may appeal to the Commonwealth Court.

(5) Institute, in a court of competent jurisdiction proceedings to compel compliance with any order of the department from which there has been no appeal or which has been sustained on appeal.

(6) Act as the agent for the board in holding public hearings when so directed by the board.

(7) Institute prosecutions under this act.

(8) Recommend the minimum job qualifications of personnel employed by county and municipal air pollution control agencies hereafter created.

(9) Require the submission of, and consider for approval, plans and specifications of air pollution control equipment, devices or process changes, and inspect such installations or modifications to insure compliance with the plans which have been approved.

(10) Conduct or cause to be conducted studies and research with respect to air contaminants, their nature, causes and effects, and with respect to the control, prevention, abatement and reduction of air pollution and air contamination.

(10.1) Evaluate motor vehicle emission control programs with respect to their effect upon air pollution and determine the need for modifications of such programs.

(11) Determine by means of field studies and sampling the degree of air pollution existing in any part of the Commonwealth.

(12) Prepare and develop a general comprehensive plan for the control and abatement of existing air pollution and air contamination and for the abatement, control and prevention of any new air pollution and air contamination, recognizing varying requirements for the different areas of the Commonwealth, and to submit a comprehensive plan to the board for its consideration approval.

(13) Encourage the formulation and execution of plans in conjunction with air pollution control agencies or civil associations of countries, cities, boroughs, towns and townships of the Commonwealth wherein any sources of air pollution or air contamination may be located, and enlist the

cooperation of those who may be in control of such sources for the control, prevention and abatement of such air pollution and air contamination.

(14) Encourage voluntary efforts and cooperation by all persons concerned in controlling, preventing, abating and reducing air pollution and air contamination.

(15) Conduct and supervise educational programs with respect to the control, prevention, abatement and reduction of air pollution and air contamination, including the preparation and distribution of information relating to the means of controlling and preventing such air pollution and air contamination.

(16) Develop and conduct in cooperation with local communities demonstration programs relating to air contaminants, air pollution and air contamination and the control, prevention, abatement and reduction of air pollution and air contamination.

(17) Provide advisory technical consultative services to local communities for the control, prevention, abatement and reduction of air pollution and air contamination.

(18) Cooperate with the appropriate agencies of the United States or of other states or any interstate agencies with respect to the control, prevention, abatement and reduction of air pollution, and where appropriate formulate interstate air pollution control compacts or agreements for the submission thereof to the General Assembly.

(19) Serve as the agency of the Commonwealth for the receipt of moneys from the Federal government or other public or private agencies, and expend such moneys for studies and research with respect to air contaminants, air pollution and the control, prevention, abatement and reduction of air pollution.

(20) Do any and all other acts and things not inconsistent with any provision of this act, which it may deem necessary or proper for the effective enforcement of this act and the rules or regulations which have been promulgated thereunder.

Section 4.1. Agricultural Regulations Prohibited. — The Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities in their unmanufactured state but shall not include the use of materials produced or manufactured off the premises of the farm operation.

Section 5. Environmental Quality Board. — The board shall have the power and its duty shall be to —

(1) — Adopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth or to such parts or regions or subregions thereof specifically designated in such regulation which shall be applicable to all air contamination sources regardless of whether such source is required to be under permit by this act. Such rules and regulations may establish maximum allowable emission rates of air contaminants from such sources, prohibit or regulate the combustion of certain fuels, prohibit or regulate open burning, prohibit or regulate any process or source or class of processes or sources, require the installation of specified control devices or equipment, or designate the control efficiency of air pollution control devices or equipment required in specific processes or sources or classes of processes or sources. Such rules and regulations shall be adopted pursuant to the provisions of the act of July 31, 1968 (Act No. 240), known as the "Commonwealth Documents Law," upon such notice and after such public hearings as the board deems appropriate. In exercising its authority to adopt rules and regulations, the

board may, and to the extent deemed desirable by it shall, consult with a council of technical advisers, properly qualified by education or experience in air pollution matters, appointed by the board and to serve at the pleasure of the board, to consist of such number of advisers as the board may appoint, but such technical advisers shall receive no compensation, other than their actual and necessary expenses, for their services to the board.

(2) Establish and publish maximum quantities of air contaminants that may be permitted under various conditions at the point use from any air contaminant source in various areas of the Commonwealth so as to control air pollution.

(3) By the rule or regulation, classify air contaminant sources, according to levels and types of emissions and other characteristics which relate to air pollution. Classifications made pursuant to this subsection shall apply to the entire Commonwealth or any part thereof. Any person who owns or operates an air contaminant source of any class to which the rules and regulations of the board under this subsection apply, shall make reports containing information as may be required by the board concerning location, size and height of air contaminant outlets, processes employed, fules used and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.

(4) Recommend to the Secretary of Transportation performance or specification standards, or both, for emission control systems and devices on motor vehicles.

(5) Adopt rules and regulations for the protection of public health and safety for periods when the accumulation of air contaminants in any area is attaining or has attained levels which, if sustained or exceeded, could lead to an acute threat to the health of the public. Such rules and regulations

shall contain appropriate procedures to protect public health and safety during such periods.

(6) Adopt rules and regulations for the approval and the recision and suspension of approval of local air pollution control agencies.

Section 6. Environmental Hearing Board. — The hearing board shall have the power and its duty shall be to hear and determine all appeals from orders issued by the department in accordance with the provisions of this act. Any and all action taken by the hearing board with reference to any such appeal shall be in the form of an adjudication, and all such action shall be subject to the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law.".

Section 6.1. Permits. — (a) On or after July 1, 1972, no person shall construct, assemble, install or modify any stationary air contamination source, or install thereon any air pollution control equipment or device or reactivate any air contamination source after said source has been out of operation or production for a period of one year or more unless such person has applied to and recieved from the department written approval so to do: Provided, however, that no such written approval shall be necessary with respect to normal routine maintenance operations, nor to any such source, equipment or device used solely for the supplying of heat or hot water to one structure intended as a one-family or two-family dwelling, or with respect to any other class of units as the board, by rule or regulation, may exempt from the requirements of this section. All applications for approval shall be made in writing and shall be on such forms and contain such information as the department shall prescribe and shall have appended thereto detailed plans and specifications related to the proposed installation.

(b) No person shall operate any stationary air contamination source which is subject to the provisions of subsection (a) of this section unless the department shall have issued to such person a permit to operate such source in response to a written application for a permit submitted on forms and containing such information as the department may prescribe. No permit shall be issued to any applicant unless it appears that, with respect to the source, the requirements of subsection (a) of this section have been met and that there has been peformed upon such source a test operation or evaluation which shall satisfy the department that the air contamination source will not discharge into the outdoor atmosphere any air contaminants at a rate in excess of that permitted by applicable regulation of the board, and which will not cause air pollution. Permits issued hereunder may contain such conditions as the department deems necessary to assure the proper operation of the source. Each permittee, on or before the anniversary date set forth in his permit, shall submit to the department an annual report containing such information as the department shall prescribe relative to the operation and maintenance of the installation under permit.

(c) Any permit issued hereunder may be revoked or suspended if the permitee operates the source subject to the permit in such a manner as to be in violation of the conditions of any permit or rule or regulation of the board or in such a manner as to cause air pollution, if the permittee fails to properly or adequately maintain or repair any air pollution control device or equipment attached to or otherwise made a part of the source, of if the permittee has failed to submit any annual report as required under this section.

(d) The department may refuse to grant approval for any stationary air contamination source subject to the provisions of subsection (a) of this section or to issue a permit to operate such source if it appears, from the data available to

the department, that the proposed source, or proposed changes in such source, are likely either to cause air pollution or to violate any board rule or regulation applicable to such source, of if, in the design of such source, no provision is made for adequate facilities to conduct source testing. The department may also refuse to issue a permit to any person who has constructed, installed or modified any air contamination source, or installed any air pollution control equipment or device on such source contrary to the plans and specifications approved by the department.

(e) Whenever the department shall refuse to grant an approval or to issue a permit hereunder or suspend or revoke a permit already issued, such action shall be in the form of a written notice to the person affected thereby informing him of the action taken by the department and setting forth, in such notice, a full and complete statement of the reasons for such action. Such notice shall be served upon the person affected, either personally or by certified mail, and the action set forth in the notice shall be final and not subject to review unless, within thirty (30) days of the service of such notice, any person affected thereby shall appeal to the hearing board, setting forth with particularity the grounds relied upon. The hearing board shall hear the appeal pursuant to the provisions of the rules and regulations relating to practice and procedure before the hearing baord, and thereafter, shall issue an adjudication affirming, modifying or overruling the action of the department. Thereafter, any aggrieved party to the proceeding, including the department, may appeal the action of the hearing board to the Commonwealth Court.

(f) The board may, by rule, require the payment of a reasonable fee, not to exceed two hundred dollars ($200.00), for the processing of any application for plan approval or for an operating permit under the provisions of this section.

Section 6.2 Emergency Procedure. — (a) Any other provision of law to the contrary notwithstanding, if the department finds, in accordance with the rules and regulations of the board adopted under the provisions of clause (5) of section 5 of this act, that a generalized condition of air pollution exists and that it creates an emergency requiring immediate action to protect human health or safety, the department, with the concurrence of the Governor, shall order persons causing or contributing to the air pollution to immediately reduce or discontinue the emission of air contaminants.

(b) In the absence of a generalized condition of air pollution, if the department finds that emissions from the operation of one or more air contamination sources are creating an imminent danger to human health or safety, the department may, without regard to the provisions of section 4 of this act, order the persons responsible for the operation of the air contamination sources in question to immediately reduce or discontinue the emission of air contaminants.

(c) An order issued under subsection (a) or (b) of this section shall fix a place and time, not later than twenty-four hours thereafter, for a hearing to be held before the hearing board. Within twenty-four hours after the commencement of such hearing, and without adjournment thereof, the hearing board shall affirm, modify or set aside the order of the department.

(d) This section shall not be construed to limit any power which the Governor or any other officer may have to declare an emergency and act on the basis of such declaration.

Section 7. Public Hearings. — (a) Public hearings shall be held by the board or by the department, acting on behalf and at the direction or request of the board, in any region of the Commonwealth affected before any rules or regulations

with regard to the control, abatement, prevention or reduction of air pollution are adopted for that region or subregion. When it becomes necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for more than one region of the Commonwealth, the board may hold one hearing for any two contiguous regions to be affected by such rules and regulations. Such hearing may be held in either of the two contiguous regions. In the case where it become necessary to adopt rules and regulations for the control, abatement, prevention or reduction of air pollution for any area of the Commonwealth which encompasses more than one region or parts of more than one region, public hearings shall be held in the area concerned. Full stenographic transcripts shall be taken of all public hearings and shall be made available by the department to any party concerned with the subject matter of the hearing upon the payment of prevailing rates for such transcripts.

(b) In addition to the matters discussed at the public hearings, the board may, in its discretion, solicit the views, in writing, of persons who may be affected by, or interested in, proposed rules and regulations.

(c) Notice to the public of the time and place of any public hearing shall be given at least thirty (30) days prior to the scheduled date of the hearing by public advertisment in a newspaper or newspapers of general circulation in the region of the Commonwealth affected.

(d) The persons designated to conduct the hearing shall have the power to issue notices of hearings in the name of the board.

(e) Full opportunity to be heard with respect to the subject of the hearing shall be given to all persons in attendance, in addition to which persons, whether or not in attendance,

may, within thirty (30) days, submit their views to the department, which the department shall transmit to the board with its report.

Section 8. Unlawful Conduct. — It shall be unlawful to fail to comply with any rule or regulation of the board or to fail to comply with any order of the department, to violate or to assist in the violation of any of the provisions of this act or rules and regulations adopted hereunder, to cause air pollution, or to in any manner hinder, obstruct, delay, resist, prevent or in any way interfere or attempt to interfere with the department or its personnel in the performance of any duty hereunder.

Section 9. Penalties. — (a) Summary Offense. Any person as herein defined, except a department, board, bureau or agency of the Commonwealth, engaging in unlawful conduct as set forth in section 8 of this act, shall, for each offense, upon conviction thereof in a summary proceeding before a district justice, magistrate, alderman or justice of the peace, be sentenced to pay the costs of prosecution and a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), and, in default thereof, to undergo imprisonment of not less than ten (10) days not more than thirty (30) days.

(b) Misdemeanors. Any person as herein defined, except a department, board, bureau or agency of the Commonwealth, who, within two years after being convicted of a summary offense pursuant to subsection (a) of this section, engages in similar unlawful conduct, shall be guilty of a misdemeanor and, upon conviction thereof, shall, for each separate offense, be subject to a fine of not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00), or to imprisonment for a period of not more than one year for each separate offense hereunder, or both. For the purpose of this subsection, similar unlawful conduct

shall mean violation of the same order of the department or a violation of the same provision of any rule or regulation of the department by the same organizational unit of the defendant.

(c) For the purpose of this section, violations on separate days shall be considered separate offenses. Where a person engages in continuing unlawful conduct, such person shall be guilty of separate offenses for each day such conduct continues up until the time of hearing or trial.

(d) Upon conviction of an association, partnership or corporation of an offense under subsection (a) or (b) of this section, the responsible members, officers, employes or agents may be imprisoned for the term provided therein which shall run concurrently with any term of imprisonment imposed upon such persons individually upon conviction for the same offense.

Section 9.1. Civil Penalties. — In addition to proceeding under any other remedy available at law, or in equity, for a violation of a provision of this act, or a rule or regulation of the board, or an order of the department, the hearing board, after hearing, may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000.00), plus up to two thousand five hundred dollars ($2,500.00) for each day of continued violation. In determining the amount of the civil penalty, the hearing board shall consider the willfulness of the violation, damage or injury to the outdoor atmosphere of the Commonwealth or its uses, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debt. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may

accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person, but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The hearing board may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof.

Section 9.2. Disposition of Fines and Civil Penalties. — All fines, civil penalties and fees collected under this act shall be paid into the Treasury of the Commonwealth in a special fund known as the "Clean Air Fund," hereby established, which shall be administered by the department for use in the elimination of air pollution. The board shall adopt rules and regulations for the management and use of the money in the fund.

Section 10. Civil Remedies — (a) The Attorney General, at the request of the department, may initiate, by petition, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has its place of business, an action for the enforcement of any order issued pursuant to this act by the department from which no timely appeal has been taken on which has been sustained on appeal. The court, in such proceeding, shall have the power to grant such temporary relief as it deems just and proper and if, after hearing, the court finds that such order has not been fully complied with, the court shall enforce such order by requiring immediate and full compliance therewith. The Commonwealth shall not be required to furnish bond or other security in any proceeding instituted under this subsection.

(b) In addition to any other remedies provided for in this act, the Attorney General, at the request of the depart-

ment, may initiate, in the Commonwealth Court or the court of common pleas of the county in which the defendant resides or has his place of business, an action in equity for an injunction to restrain any and all violations of this act or the rules and regulations promulgated hereunder, or to restrain any public nuisance or detriment to health caused by air pollution. In any such proceeding, the court shall, upon motion of the Commonwealth, issue a preliminary injunction if it finds that the defendant is engaging in unlawful conduct, as defined in section 8 of this act, or is engaging in conduct which is causing immediate and irreparable harm to the public. The Commonwealth shall not be required to furnish bond or other security in connection with such proceedings. In addition to an injunction, the court, in such equity proceedings, may levy civil penalties as specified in section 9.2 of this act.

(c) Whenever an order of the department, issued hereunder, has been directed to a political subdivision, municipality, district, authority or agency of the Commonwealth, and such order has become final or has been sustained on appeal, the Attorney General, at the instance of the department, may enforce such order by an action in mandamus.

(d) In addition to any other remedies provided for in this act, upon relation of any district attorney of any county affected, or upon relation of the solicitor of any municipality affected, an action in equity may be brought in a court of competent jurisdiction for an injunction to restrain any and all violations of this act or the rules and regulations promulgated hereunder, or to restrain any public nuisance or detriment to health caused by air pollution.

(e) The penalties and remedies prescribed by this act shall be deemed concurrent and the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy hereunder, at law or in equity.

(f) Suits to abate such nuisances or suits to restrain or prevent any violation of this act may be instituted at law or in equity by any resident of the Commonwealth after thirty (30) DAYS notice has first been served upon the Attorney General of the intention to so proceed. Such proceedings may be prosecuted in the court of common pleas of the county where the activity has taken place, the condition exists, or the public is affected, and to that end jurisdiction is hereby conferred in law and equity upon such courts. Except in cases of emergency where, in the opinion of the court, the exigencies of the case require immediate abatement of said nuisances, the court may, in its decree, fix a reasonable time during which the person responsible for the nuisances may make provision for the abatement of the same. The court may provide for the payment of civil penalty as specified in section 9.1 of this act during the time when air pollution will continue under its decree. It shall not be necessary to the maintenance of such a suit by any resident of the Commonwealth that he shall prove that he has suffered or will suffer any personal loss or damage.

Section 11. Powers Reserved to the Department Under Existing Laws.—Nothing in this act shall limit in any way whatever the powers conferred upon the department under laws other than this act, it being expressly provided that all such powers are preserved to the department and may be freely exercised by it.

The department shall have the right upon approval of the Attorney General, to petition a court of competent jurisdiction to order the abatement of any nuisance or condition detrimental to health. For the purpose no court exercising general equitable jurisdiction shall be deprived of such jurisdiction even though such nuisance or condition detrimental to health is subject to regulation or other action by the board under this act.

Section 12. Powers Reserved to Political Subdivision. — (a) Nothing in this act shall prevent counties, cities, towns, townships or boroughs from enacting ordinances with respect to air pollution which will not be less stringent than the provisions of this act or the rules and regulations promulgated pursuant to its provisions. This act shall not be construed to repeal existing ordinances, resolutions or regulations of the aforementioned political subdivisions existing at the time of the effective date of this act, except as they may be less stringent than the provisions of this act.

(b) The administrative procedures for the abatement, reduction, prevention and control of air pollution set forth in this act shall not apply to any political subdivision of the Commonwealth which has an approved air pollution control agency.

(c) Whenever, either upon complaint made to or initiated by the department, the department finds that any person is in violation of air pollution control standards or rules and regulations promulgated pursuant to the grant of authority made in subsection (b), the department shall give notification of that fact to that person and to the air pollution control agency of the political subdivision involved.

If such violation continues to exist after said notification has been given, the department may take any abatement action provided for under the terms of this act.

(d) Whenever the department finds that violations of the air pollution control standards, or rules and regulations promulgated pursuant to the grant of authority under subsection (b) are so widespread that such violations appear to result from a failure of the local control agency involved to enforce those standards, or rules and regulations, the department may assume the authority to enforce those standards, and rules and regulations.

(e) The department shall have the power to refuse approval, or to suspend or rescind approval, once given, to any air pollution control agency if the department finds that such agency is unable or unwilling so to conduct an air pollution control program as to abate or reduce air pollution problems within its jurisdiction in an effective manner.

(f) Whenever the department takes action under the provisions of subsections (d) or (e) of this section, it shall give written notification to the air pollution control agency of the political subdivision involved and such notification shall be subject to the appeal provisions of clause (4.1) of section 4 of this act.

(g) Irrespective of subsection (b) above, and in order that the civil and criminal penalties and equitable remedies for air pollution violations shall be uniform except insofar as they are inconsistent with the jurisdictional limitations of the minor judiciary and the Philadelphia municipal court, throughout the Commonwealth, the penalties and remedies set forth in this act in sections 9, 9.1, 10 and 11, shall be the penalties and remedies available for enforcement of any municipal air pollution ordinances or regulations, and shall be available to any municipality, public official, or other person having standing to initiate proceedings for the enforcement of such municipal ordinances or regulations, and the amounts of the fines or civil penalties set forth herein shall be the amounts of the fines or civil penalties assessable and to be levied for violations of any municipal ordinances or regulations. It is hereby declared to be the purpose of this section to enunciate further that the purpose of this act is to provide additional and cumulative remedies to abate the pollution of the air of this commonwealth. Any action for the assessment of civil penalties brought for the enforcement of a municipal air pollution ordinance or regulation shall be brought in accordance with the procedures set forth in such

ordinance. Where any municipal ordinance or regulation does not provide a procedure for the assessment of civil penalties, the provisions of subsection (f) of this section shall apply.

(h) Any person, as herein defined, except a department, board, bureau, or agency of the Commonwealth, engaging in conduct in violation of a municipal air pollution control ordinance, shall, for each offense, upon conviction thereof in a civil proceeding before a judge of the Municipal Court of Philadelphia, district justice, magistrate, alderman or justice of the peace be sentenced to pay the cost of prosecution and a civil penalty of not less than twenty-five dollars ($25.00), nor more than five hundred dollars ($500.00) for each day of continued violation. Such a penalty may be assessed whether or not the violation was willful. Failure to pay any such penalty within the time prescribed by law shall be punishable as a civil contempt. Notwithstanding anything contained in section 9.2 of this act, all civil penalties and fees collected under this subsection shall be paid to appropriate political subdivision, as provided by law, and shall be collectible in any manner provided by law for the collection of debt. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall be a lien in favor of the appropriate political subdivision upon the property, both real and personal, of such person, but only after the same has been entered and docketed of record by the prothonotary of the county where such is situated: provided, that nothing contained in this subsection shall preclude any public official from seeking, at law or at equity or before any appropriate administrative body, the assessment of civil penalties in the amount provided by section 9.1 of this act.

Section 12.1. Construction.—Nothing in this act shall be construed as estopping the commonwealth, or any district

attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate pollutions forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the air of this commonwealth, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision of this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights. No courts of this commonwealth having jurisdiction to abate public or private nuisance shall be deprived of such jurisdiction to abate any private or public nuisance instituted by any person for the reason that such nuisance constitutes air pollution.

Section 13. Public Nuisances.—A violation of any order of any provision of any rule or regulation promulgated pursuant to a local air pollution code or to a state air pollution act, which limits or controls the emission of any air contaminant shall constitute a public nuisance and shall be abatable in the manner provided by law.

Section 13.1. Search Warrants.—Whenever an agent or employe of the department, charged with the enforcement of the provisions of this act, has been refused the right to examine any air contamination source, or air pollution control equipment or device, or is refused access to or examination of books, papers and records pertinent to any matter under investigation, such agent or employe may apply for a search warrant to any Commonwealth to issue the same to

enable him to have access and examine such property, air contamination source, air pollution control equipment or device, or books, papers and records, as the case may be. It shall be sufficient probable cause to issue a search warrant that the inspection is necessary to properly enforce the provisions of this act.

Section 13.2. Confidential Information.—All records, reports or information obtained by the department or referred to at public hearings under the provisions of this act shall be available to the public, except that upon cause shown by any person that the records, reports or information, or a particular portion thereof, but not emission data, to which the department has access under the provisions of this act, if made public, would divulge production or sales figures or methods, processes or production unique to such person or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, the department shall consider such record, report or information, or particular portion thereof confidential in the administration of this act. Nothing herein shall be construed to prevent disclosure of such report, record or information to Federal, State or local representatives as necessary for purposes of administration of any Federal, State or local air pollution control laws, or when relevant in any proceeding under this act.

Section 13.3. Existing Rules, Regulations, Permits and Approvals.—Any board or department rules and regulations which require approvals or permits with regard to any air contamination source or air pollution equipment or device in effect at the passage of this act shall continue in effect with respect to such sources until June 30, 1972. Any permit or approval granted pursuant to the provisions of such rules and regulations shall be deemed to have been issued pursuant to the provisions of this act.

Section 13.4. Public Nuisances.—A violation of any order, or of any provision of any rule or regulation, issued or promulgated pursuant to this act, or pursuant to any municipal air pollution control ordinance or code, which limits the emission of any air contaminant shall constitute a public nuisance and shall be abatable in the manner provided by law.

Section 13.5. Variances.—(a) The department shall have the power to grant temporary variances from the effect of any provision of this act, or of any rule or regulations adopted hereunder, which limits the emission of any air contaminate, and the environmental quality board, subject to the provisions of this section, shall adopt rules and regulations setting forth the terms and conditions subject to which such variances shall be granted. Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by federal law within the time prescribed by such law for the attainment of such standard.

(b) Subject to the foregoing provisions, for the sole purpose of protecting recent substantial investments in air pollution control devices or equipment, the department shall have the power and its duty shall be to grant a temporary variance to the owner or operator of any source where it appears that:

(1) Installation of air pollution control devices or equipment on such source was commenced or completed after January 28, 1969 and before January 27, 1972;

(2) Such installation was required in order to comply with all standards and regulations in effect at the time installation was commenced and when completed did in fact comply with said standards and regulations;

(3) The standard from which a variance is sought is more stringent than the applicable standard in effect at the

time installation of the control equipment was commenced or completed; and

(4) Compliance with the standard from which a variance is sought cannot feasibly be accomplished by the installation of additional or supplemental air pollution control devices and equipment which, used together with existing air pollution control devices and equipment, would enable the source to comply with the upgraded standard.

(c) The rules and regulations with respect to variances adopted by the environmental quality board prior to the effective date of this act shall continue in full force and effect, except that notwithstanding any provision thereof establishing a different time limitation for variances, a temporary variance granted pursuant to the provisions of subsection (b) of this section may be granted for a period not to exceed ten (10) years from the date of completion of installation of the air pollution control equipment or devices, or for the period of depreciation or amortization of said equipment or devices for the purposes of section 167 or section 169, or both, of the Internal Revenue Code of 1954, whichever period ends first: provided, further, that any variance granted under said subsection shall not be subject to renewal.

Section 14. Severability.—The provisions of this act shall be severable. If any provision of this act is found by a court of record to be unconstitutional and void, the remaining provisions of the act shall, nevertheless, remain valid unless the court finds the valid provisions of the act are so essentially and inseparably connected with, and so depend upon, the void provision that it cannot be presumed the Legislature would have enacted the remaining valid provisions without the void ones; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are capable of being executed in accordance with the legislative intent.

PENNSYLVANIA STANDARDS FOR CONTAMINANTS

(Title 25, Rules and Regulations; Part I, Department of Environmental Resources; Subpart C. Protection of Natural Resources; Article III, Air Resources; Chapter 123, Standards for Contaminants; Adopted September 2, 1971, Amended through October 31, 1973; Amended April 27, 1974; October 25, 1974, Effective November 10, 1974; July 25, 1975; July 15, 1976, Effective August 9, 1976, August 13, 1977, Effective August 28, 1977)

FUGITIVE EMISSIONS

§123.1 Prohibition of certain fugitive emissions.

(a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any fugitive air contaminant from any source except from:

(1) Construction or demolition of buildings or structures.

(2) Grading, paving and maintenance of roads and streets.

(3) Use of roads and streets. Emissions from material in or on trucks, railroad cars and other vehicular equipment shall not be considered as emissions from use of roads and streets.

(4) Clearing of land.

(5) Stockpiling of materials.

(6) Open burning operations.

(7) Blasting in open pit mines. Emissions from drilling shall not be considered as emissions from blasting.

(8) Coke oven batteries, provided the fugitive air contaminants emitted from any coke oven battery comply with

the standards for visible fugitive emissions in §§123.44 (relating to limitations of visible fugitive air contaminants from operation of any coke oven battery) and 129.15 (relating to coke pushing operations) of this Title.

(9) Sources and classes of sources other than those identified in paragraphs (1)-(8) of this subsection, for which the operator has obtained a determination from the Department that fugitive emissions from the source, after appropriate control, meet the following requirements:

(i) the emissions are of minor significance with respect to causing air pollution; and

(ii) the emissions are not preventing or interfering with the attainment or maintenance of any ambient air quality standard.

(b) Application forms for requesting a determination under either subsection (a)(9) of this section or §129.15(c) of this Title (relating to coke pushing operation) are available from the Department. In reviewing such applications, the Department may require the applicant to supply information including, but not limited to, a description of proposed control measures, characteristics of emissions, quantity of emissions, and ambient air quality data and analysis showing the impact of the source on ambient air quality. The applicant shall be required to demonstrate that the requirements of subsections (a)(9) and (c) of this section and §123.2 of this Title (relating to fugitive particulate matter) or of the requirements of §129.15(c) of this Title (relating to coke pushing operation) have been satisfied. Upon such demonstration, the Department will issue a determination, in writing, either as an operating permit condition, for those sources subject to permit requirements under the act, or as an order containing appropriate conditions and limitations.

(c) Any person responsible for any source specified paragraphs (1)-(7) or (9) of subsection (a) of this section shall take all reasonable actions to prevent particulate matter from becoming airborne. Such actions shall include, but not be limited to, the following:

(1) Use, where possible, of water or chemicals for control of dust in the demolition of buildings or structures, construction operations, the grading of roads or the clearing of land.

(2) Application of asphalt, oil, water or suitable chemicals on dirt roads, material stockpiles, and other surfaces which may give rise to airborne dusts.

(3) Paving and maintenance of roadways.

(4) Prompt removal of earth or other material from paved streets onto which earth or other material has been transported by trucking or earth moving equipment, erosion by water, or other means.

(d) The requirements contained in subsection (a) of this section and §123.2 of this Title (relating to fugitive particulate matter) shall not apply to fugitive emissions arising from the production of agricultural commodities in their unmanufactured state on the premises of the farm operation.

§123.2. Fugitive particulate matter.

No person shall cause, suffer, or permit fugitive particulate matter to be emitted into the outdoor atmosphere from any source or sources specified in §123.1(a)(1)—(9) of this Title (relating to prohibition of certain fugitive emissions) if such emissions are either:

(1) visible, at any time, at the point such emissions pass outside the property of the person, irrespective of the concentration of particulate matter in such emissions; or

(2) not visible at the point such emissions pass outside the property of the person and the average concentration, above background, of three samples, of such emissions at any point outside such property, exceeds 150 particles per cubic centimeter.

PARTICULATE MATTER EMISSIONS

§123.11. Combustion units.

(a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of particulate matter, at any time, from any combustion unit in excess of the following:

(1) The rate of 0.4 lbs. per million B.t.u. of heat input, when the heat input to the combustion unit in millions of B.t.u.'s per hour is greater than 2.5 but less than 50.

(2) The rate determined by the following formula.

$$A = 3.6E^{.056}$$

where:

A = Allowable emissions in pounds per million B.t.u. of heat input, and

E = Heat input to the combustion unit in millions of B.t.u.'s per hour,

when E is equal to or greater than 50 but less than 600.

(3) The rate of 0.1 pounds per million B.t.u. of heat input when the heat input to the combustion unit in millions of B.t.u.'s per hour is equal to or greater than 600.

(b) Allowable emissions under subsection (a) of this section are graphically indicated in Appendix A appended to this Chapter.

§123.12. Incinerators.

No person shall cause, suffer, or permit the emission to the outdoor atmosphere of particulate matter from any

incinerator, at any time, in such a manner that the particulate matter concentration in the effluent gas exceeds 0.1 grain per dry standard cubic foot, corrected to 12% carbon dioxide.

§123.13. Processes.

(a) Subsections (b) and (c) of this section shall apply to all processes except combustion units and incinerators.

(b) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of particulate matter from any process listed in the following table, at any time, either in excess of the rate calculated by the formula set forth in paragraph (2) of this subsection or in such a manner that the concentration of particulate matter in the effluent gas exceeds 0.02 grains per dry standard cubic foot, whichever is greater:

(1) *Table*

TABLE 1

Process		*Process Factor, F*
1.	Carbon black mfg.	500 lbs./ton of product
2.	Charcoal mfg.	400 lbs./ton of product
3.	Crushers or grinders or screens	20 lbs./ton of feed
4.	Paint mfg.	0.05 lbs./ton of pigment handled
5.	Phosphoric acid mfg.	6 lbs./ton of phosphorous burned
6.	Detergent drying	30 lbs./ton of product
7.	Alfalfa dehydration	30 lbs./ton of product
8.	Grain elevators: Loading or unloading	90 lbs./ton of grain
9.	Grain screening and cleaning	300 lbs./ton of grain
10.	Grain drying	200 lbs./ton of product
11.	Meat smoking	0.01 lbs./ton of meat
12.	Ammonium nitrate mfg.: Granulator	0.1 lbs./ton of product
13.	Ferroalloy production furnace	0.3 lbs./ton of product

(1) *Table*

TABLE 1

Process	*Process Factor, F*
14. Primary iron and/or steel making:	
Iron production	100 lbs./ton of product
Sintering: windbox	20 lbs./ton of dry solids feed
Steel production	40 lbs./ton of product
Scarfing	20 lbs./ton of product
15. Primary lead production:	
Roasting	0.004 lbs./ton of ore feed
Sintering: windbox	0.2 lbs./ton of sinter
Lead reduction	0.5 lbs./ton of product
16. Primary zinc production:	
Roasting	3 lbs./ton of ore feed
Sintering: windbox	2 lbs./ton of product
Zinc reduction	10 lbs./ton of product
17. Secondary aluminum production:	
Sweating	50 lbs./ton of aluminum product
Melting and refining	10 lbs./ton of aluminum feed
18. Brass and bronze production:	
Melting and refining	20 lbs./ton of product
19. Iron foundry:	
Melting:	
5T./hr. and less	150 lbs./tons of iron
More than 5T./hr.	50 lbs./ton of iron
Sand handling	20 lbs./ton of sand
Shake-out	20 lbs./ton of sand
20. Secondary lead smelting	0.5 lbs./ton of product
21. Secondary magnesium smelting	0.2 lbs./ton of product
22. Secondary zinc smelting:	
Sweating	0.01 lbs./ton of product
Refining	0.3 lbs./ton of product

§121.7. Prohibition of air pollution.

No person shall cause, suffer, or permit air pollution as that term is defined in the act.

* * * * *

§131.2. National ambient air quality standards.

National Ambient Air Quality Standards promulgated by the Administrator of the United States Environmental Protection Agency pursuant to the provisions of the Clean Air Act, are hereby incorporated, by reference, as part of the standards in §131.3 of this Title (relating to ambient air quality standards).

PLAN APPROVAL AND PERMITS

§127.11. Requirements.

No person shall cause, suffer, or permit the construction or modification of any air contamination source or the reactivation of any air contamination source after said source has been out of operation or production for a period of one year or more, or the installation of any air cleaning device on any air contamination source, unless such construction, modification, reactivation or installation has been approved by the Department.

Subpart NN—Pennsylvania

SOURCE: 37 FR 10889, May 31, 1972, unless otherwise noted.

§52.2020 Indentification of plan.

(a) Title of plan: "Pennsylvania's Implementation Plan."

(b) The Plan was officially submitted on January 27, 1972.

(c) The plan revisions listed below were submitted on the dates specified.

(1) Regulations 121, 123, 127, 129, 131, 135, 137, 139, and 141 of the Pennsylvania Code of regulations submitted March 17, 1972, by the Pennsylvania Department of Environmental Resources.

(2) Air Quality Data for three additional months regarding Reading Air Basin SO_2 strategy submitted March 27, 1972, by the Pennsylvania Department of Environmental Resources.

(3) Miscellaneous non-regulatory additions and clarifications to the plan submitted on May 4, 1972, by the Pennsylvania Department of Environmental Resources.

(4) Article XVIII of the Air Pollution Control Regulations regarding Allegheny County, submitted on June 6, 1972, by the Governor.

(5) Non-regulatory additions to plan regarding Allegheny County Source Surveillance regulations submitted on June 20, 1972, by the Pennsylvania Department of Environmental Resources.

(6) Miscellaneous non-regulatory additions to the plan submitted August 14, 1972, by the Pennsylvania Department of Environmental Resources.

(7) Revision to Philadelphia Air Management Services regulations submitted November 3, 1972, by the Governor.

(8) Revision to compliance schedules for Clairton Coke Works in Allegheny County submitted December 14, 1972, by the Governor.

(9) Transportation Control Plan for Southwest Pennsylvania and Metropolitan Philadelphia AQCR's submitted April 13, 1973, by the Governor.

(10) [Reserved]

(11) Amendments to Philadelphia Air Management Services regulation number 3 submitted April 15, 1974, by the Governor.

(12) Amendments to Philadelphia Air Management Services regulations numbers 1, 2 and 11 submitted May 28, 1974, by the Governor.

(13) Process factor for glass production furnaces submitted on December 26, 1974, by the Pennsylvania Department of Environmental Resources.

(14) Amendments to Chapters 123 (§123.24) and 139 (§139.13), controlling zinc smelter operations; submitted on August 7, 1975 by the Pennsylvania Department of Environmental Resources.

[38 FR 16567, June 22, 1973, as amended at 41 FR 8965, Mar. 2, 1976; 41 FR 18078, Apr. 30, 1976; 41 FR 42675, Sept. 28, 1976; 41 FR 53326, Dec. 6, 1976]

§52.2023 Approval status.

(a) With the exceptions set forth in this subpart, the Administrator approves Pennsylvania's plan for attainment and maintenance of the national standards.

(b) With respect to the transportation control plan submitted on April 13, 1973, the Administrator approves the inspection program, with the exceptions set forth in §§52.2030, 52.2031, and 52.2036 and promulgates rectifying provisions in §§52.2033 and 52.2053.

(c) With respect to the transportation control plan submitted on April 13, 1973, the Administrator approves the mass transportation improvements and automobile-use disincentives, with the exceptions set forth in §§52.2030, 52.2031, and 52.2036, and promulgates rectifying provisions in §§52.2040, 52.2041, and 52.243 through 52.2053.

(d) With respect to the transportation control plan submitted on April 13, 1973, the Administrator disapproves the plan for vehicle exclusion on selected days.

[38 FR 32893, Nov. 28, 1973]

§21.14. Intervenors.

(a) Petitions for leave to intervene in any proceeding before the board shall be filed prior to initial presentation of evidence in such proceeding and shall set forth the specific grounds for the proposed intervention, the position and interest of the petitioner in the proceeding and a statement wherein said interest is or may be inadequately represented in such proceeding.

The Petition shall be in substantially the following form:

Petition to Intervene

1. Petitioner is (State name and address).

2. Petitioner believes it is entitled to intervene in the above matter for the following reasons: (List reasons).

3. Petitioner is an organization, the members of which have an interest in the above matter for the following reasons: (List reasons).

4. Petitioner will present the following kind of evidence at a hearing on the merits of the matter: (Describe evidence Petitioner will offer at the time of hearing).

5. Petitioner believes that its interest is or may be inadequately represented in the proceeding by the current parties of record because: (List reasons).

6. Petitioner hereby certifies that a copy of this Petition has been served upon all parties to the above proceeding.

Respectfully submitted:

Name of
(Attorney for Petitioner)

(b) Intervention is discretionary with the board and shall be subject to such terms and conditions as the board may prescribe. The board shall not deny the right to intervene on the basis that the proposed intervener does not have a proprietary interest affected by the action appealed.

§21.15. Discovery, witnesses.

(a) Upon request, the board shall provide to the parties subpoenas for the attendance of witnesses or for the production of documentary evidence which shall be served in the same manner as notices and other documents.

The Petition for Discovery shall be in substantially the following form:

Petition for Discovery

1. Petitioner is (Commonwealth of Pennsylvania) (Appellant-Respondent) (Defendant) in the above-captioned matter.

2. Petitioner requests the Environmental Hearing Board to issue subpoenas to the Petitioner for the purpose of taking oral depositions of the following named individual(s) who (is) (are) believed to have relevant knowledge of facts pertaining to the matter at issue before the Environmental Hearing Board. (State what general facts or relevant opinions the witnesses may be able to disclose).

3. It is requested that the (Commonwealth of Pennsylvania) (Appellant-Respondent) (Defendant) be required to answer the attached interrogatories within days from receipt of service.

4. It is hereby requested that the Board order the (Commonwealth of Pennsylvania) (Appellant-Respondent) (Defendant) to produce the following documents, or categories of documents (or documents pertaining to the following areas of inquiry). Such production shall be made for inspection and/or copying at (location), on the day of , at (time).

5. It is requested that the Board order to permit the Petitioner to inspect the following premises on or about the day of , or at such times as the parties may arrange and/or find convenient.

6. It is hereby requested that the following named person, who is not a party to this proceeding, be required by the Board to answer the attached written interrogatories within days after receipt of service.

7. The above discovery will aid in the preparation of Petitioner's case because: (List reasons).

Respectfully submitted:

Name of
(Attorney for Petitioner)

(b) Compliance with subpoenas may be excused by the board when it determines that the testimony or documents are not relevant or material to the issues or for other cause.

(c) Upon request, the board shall permit such discovery prior to hearing as the board, in its discretion, determines will best prepare the parties for a hearing on the merits of the matter and/or to aid in its settlement. Such discovery may include oral depositions, written interrogatories of both parties and non-parties and inspection of premises.

(d) The scope of discovery shall be consistent with rules of practice in the Courts of Common Pleas of the Commonwealth.

§21.33. Evidence.

(a) Parties shall have the right of presentation of evidence, cross-examination, objection, motion and argument. The board shall not be bound by technical rules of evidence but all relevant and material evidence of reasonable probative value shall be admissible. The board may limit the

number of witnesses upon any issue and may require any party to present additional evidence on any issue. All witnesses shall be sworn or shall affirm.

(b) Written testimony (on numbered lines in either narrative or question and answer form) of any witness may be admitted into evidence provided the witness is present and sworn or affirmed and provided a copy of the testimony was served upon and actually received by all other parties at least three days prior to the hearing. Five copies of any exhibit to be offered into evidence shall be made available at the time it is identified as an exhibit, unless otherwise ordered by the board for cause.

(c) Applications, permits, licenses, registrations, orders and formal notices relating to the proceeding may be considered by the board in adjudicating the case even though they have not been made a part of the record or referred to therein. The board may also take official notice of an official or public document not relating to the proceeding and of any matter subject to judicial notice.

(d) In case any matter contained in a report or other document on file with the department or board is offered in evidence, such report or document need not be produced or marked for identification but may be offered in evidence by specifying the report, document or other file containing the matter so offered.

1.

I. Preamble

The objective of this civil penalty policy is to assist in accomplishing the goals of environmental laws by deterring violations and encouraging voluntary compliance.

The elements of the policy reflect years of experience by federal, state and local enforcement officials, adapted to present conditions and needs. The policy has had the benefit of much informed comment in meetings of federal, state, and local officials in every region, in written comments, and in a working group of federal and state enforcement officials.

The policy is based upon the main themes of the Clean Air and Water Acts, in which Congress required all citizens, private firms and public bodies to join in a common effort to restore and maintain the quality of the nation's air and waters, and to do so consistently in all parts of the country, in accordance with statutorily mandated time schedules. The theme of national consistency has been reinforced by the Clean Air Act Amendments of 1977, which directed the Administrator of the Environmental Protection Agency to promulgate regulations designed to assure fairness and uniformity in implementing and enforcing the Act by the EPA Regional Offices and the states (Clean Air Act, section 301).

The national response to the Air and Water Acts is encouraging. The overwhelming majority of citizens, private firms and public bodies have met the deadlines and complied with what was required of them. A minority have not. This penalty policy will keep faith with those who joined the common effort. It will help maintain the voluntary compliance on which achievement of our environmental goals depends.

The Clean Air and Water Acts authorize civil penalties up to stated maximums. This policy enunciates general principles for determining appropriate penalties that the government will seek in individual cases. It is based primarily on four considerations—the harm done to public health or the environment; the economic benefit gained by the violator; the degree of recalcitrance of the violator; and any unusual or extraordinary enforcement costs thrust....

• • • • •

7.

Enforcement actions must seek both expeditious compliance and adequate civil penalties. The penalties to be sought in accordance with this policy are in no way a substitute for compliance nor do they preclude injunctive relief or other non-duplicative remedies.

The goal of an enforcement action where this policy applies is both compliance (including interim controls) *and* appropriate penalties. Compliance and penalties should not be in any way traded off against each other. Compliance with the law is mandatory, and whereas details of technology or schedules may differ, enforcement officials should *not* bargain for compliance (or interim controls) by offering any reduction in penalties.

Even in the period before the statutory deadlines, the Clean Water and Air Acts both required compliance immediately or as expeditiously as practicable. After the deadline has passed, it is even more urgent that violators be brought quickly into compliance.

The penalties policy, moreover, already is structured to provide a strong economic incentive for rapid compliance, for the more rapid the compliance the lower the penalties under this policy. Such an effect is automatically built into the method of calculating the economic benefit of delayed compliance, for one of the major factors of the formula is the length of the period of noncompliance. The penalty factors of harm to the environment and recalcitrance of the violator may also lead to penalty reductions as the speed of compliance increases. In the case of major source violators of the Air Act, moreover, the requirement of mandatory, administratively assessed noncompliance penalties on sources still not in compliance by mid-1979 adds additional economic incentive for rapid compliance.

Additionally, it must be kept in mind that penalties are authorized and intended to deter violations and encourage compliance. Penalties are *not* effluent or discharge fees. Payment of penalties does not give any right or privilege to continue operation in violation of law or to slow down compliance.